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CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 1989: CHILD PROTECTION, FAMILY AUTONOMY AND THE ROLE OF THE STATE

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CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 1989: CHILD PROTECTION, FAMILY AUTONOMY, AND THE ROLE OF THE STATE.

ABSTRACT

The general purpose of this paper is to question the balance achieved by the care and protection provisions of the Children, Young Persons and Their Families Act 1989 between the interests of children and those of adults. The paper aims to suggest ways in which this balance should be realigned in favour of securing the best interests and welfare of children. The premise of the paper is that the Act's principles and practical implementation place an over reliance on family autonomy and responsibility without adequate back-up from the state. Deference to family autonomy and the principle of minimal intervention, it is submitted, undermine the Act's purpose to protect children.

The above inquiry involves focus on the Report of the Ministerial Review of the 1989 Act ("Mason Report"). It is submitted that the Mason Team's advocacy for mandatory reporting of child abuse and the paramountcy principle express a commitment to realign the balance between the competing interests of children and family. The paper also aims to provide critical analysis of the FGC process and suggest changes which would provide a more multi-disciplinary approach to dealing with cases of suspected abuse. Analysis of proposed amendments to the 1989 Act contained in the Children, Young Persons and Their Families Amendment Bill 1993 forms an important part of this paper.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 19,000 words.

I INTRODUCTION

> 1 Currently, much of the law's response to child maltreatment is not to prevent or identify risks, ostensibly out of deference to family autonomy and cultural diversity. Rather the law chooses to roar in, remove the children, and attempt to completely run family affairs when maltreatment has been 'identified'. This all-or-nothing approach leaves too much to chance and increases the stigma attached to those needing help.

Deference to family autonomy and cultural diversity means the law is not responsive to the need to prevent or identify risks of child abuse. Conversely, when abuse has been identified, family autonomy and cultural diversity count for nothing. In the New Zealand context reform under the Children, Young Persons and Their Families Act 1989 has removed, in terms of McMullen's quote above, the distinction in the laws response between "identifying" abuse and "identified" abuse.2 In effect, deference to family autonomy and cultural diversity has assumed central recognition at the post identification stage.

Speaking in Parliament during the introduction of the Children, Young Persons and Their Families Amendment Bill, Hon C Matthewson, MP, aptly stated that prior to the passing of the 1989 Act, "children and their families were, on many occasions, unnecessarily separated, or a solution was not properly put in the context of the family."3 Reform under the 1989 Act, giving effect to the prevailing political rhetoric of minimal state intervention, moved the dominant role in protecting children from the state and the courts to the family/whanau.

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1 JG McMullen "Privacy, Family Autonomy, and the Maltreated Child" (1992) 75 Marquette Law Review 569, 597.

2 Hereafter the "1989 Act."

3 NZPD, no 85, 17310, 10 August 1993.

An important part of the 1989 Act is to place greater responsibility on parents and family/whanau members for the welfare of their children. Family group conferences were established as a unique mechanism for decision making concerning issues of care and protection and youth offending.4 The ability of the law to "roar in", remove children and attempt to completely run family affairs when abuse has been "identified" was redefined within a family context.

Four years on from the 1989 Act's enactment it is necessary to ask whether the withdrawal of the state and the enhanced role of the family/whanau in the area of child protection has been too pronounced. Has deference to family autonomy and cultural diversity extended too far in New Zealand? Hon C Matthewson, MP, on 10 August 1993 stated" So the context of the family was introduced into the Act, but there is a feeling, that that has swung somewhat in the other direction."

Can the 1989 Act be labelled as regressive because it returns the protection of children to the traditional private domain of family autonomy? Does the Act, in deference to family autonomy and privacy manifest the belief engrained in legal tradition that good parenting skills will naturally evolve if family privacy is respected?4a

McMullen suggests two presumptions underlie the philosophy of family autonomy.5 First, privacy strengthens families and secondly parents can be trusted to act to advance the best interests of their children.6

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4 This paper is concerned only with the provisions as they affect care and protection issues.

4a See generally McMullen, above n1; Tapp et al, below n 15.

5 Above n 1, 585.

6. This presumption is akin to Eekelaar's "rule of optimism". See below n 86 foreword.

These two presumptions are codified by the 1989 Act. Further the Act rests on the misconception that the welfare of the child is, in most instances, inseparable from the welfare of the family.7 However, as Atkin acknowledges, the 1989 Act:8

> ...deals principally with situations where there is something wrong in the family set-up, where good parenting is breaking down, or where a child from its weak position cannot without help prevent being exploited.

Thus, how appropriate is it to equate the welfare or interests of children and their families, or to expect parents to advance the best interests of their children, where the family is not functioning well?

The degree to which the care and protection provisions of the 1989 Act and their application successfully balance the interests and rights of children as against those of their families will be the subject of general inquiry in this paper. Achieving an optimal balance is a delicate, if not impossible task. The question becomes the extent to which the state and its agents are comfortable erring on the side of either protecting family autonomy or protecting children.

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7 See generally the Report of the Working Party on the Children and Young Persons Bill, *Review of the Children and Young Persons Bill* (Department of Social Welfare, Wellington, 1987).

8 WR Atkin "New Zealand: Children Versus Families - Is There Any Conflict?" (1989) 27 Journal of Family Law 231,235-36.

The Children Young Persons and Their Families Amendment Bill, recently introduced into Parliament,9 represents a modest shift, in policy and practical terms, away from the primacy of the family/whanau.10 The Bill follows a Ministerial Review,11 headed by Judge Ken Mason, into how well the 1989 Act was working.

This paper will consider the extent to which the Amendment Bill realigns the balance between interests of children and those of the family/whanau and in the light of the Mason Report consider problems not addressed by the Amendment. Inquiry will focus on four principal areas:

(a) an evaluation of the Act's objects and principles, with particular reference to the proposed re-introduction of the paramountcy principle contained in clause 3 of the Amendment Bill (Part IV);
(b) the desirability and practicability of establishing a mandatory reporting regime under the 1989 Act, with particular focus on clause 4 of the Amendment Bill (Part V);
(c) the mechanics of the family group conference and the extent of which they protect the interests and welfare of children (Part VI);
(d) the level of State support for children and families under the Act, specifically whether emphasis on family privacy is being used as a justification for the withdrawal of the provision of social services and resources to children and their families. Does practice under the 1989 Act actually facilitate social isolation of both children and families?

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9 Introduced on the 10 August 1993. Hereafter the "Amendment Bill".

10 For example the Amendment Bill purports to re-establish the paramountcy principle and introduces the mandatory reporting of suspected cases of child abuse.

11 *Review of the Children, Young Persons, and Their Families Act 1989 - Report of the Ministerial Review Team to the Minister of Social Welfare* (1992).

A Background

1 The process of legislative reform12

Through the 1980's a comprehensive review of the Children and Young Persons Act 1974 was undertaken. In 1983, the then Minister of Social Welfare, the Hon V Young, MP, convened a conference at which a draft Child Protection Bill was debated.

Subsequently the Minister requested Parliamentary Counsel to draft a revision of the Children and Young Persons Act 1974. Introduction into Parliament of the new draft was precluded by the 1984 snap election.

The Minister of Social Welfare in the new Labour Government, the Hon A Hercus, MP, decided not to proceed with the Child Protection legislation in isolation but instead announced a further "urgent and comprehensive" review of the 1974 Act.13 A new Children and Young Persons Bill was introduced into Parliament in 1986. At the same time another key document, *Puao-te-Ata-tu* appeared, the Report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare.14

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12 Headings in this Part are drawn from P Tapp, D Geddis, N Taylor "Protecting the Family" *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 168,175-123. Tapp et al provide an excellent discussion of the influences underpinning the Act.

13 Ministerial Press Release, August 1984.

14 Department of Social Welfare, *Puao-Te-Ata-tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Government Printer, Wellington, 1986).

The new Bill and *Puao-te-Ata-tu* were seen as incompatible. The Bill's emphasis on mandatory reporting, professional decision making, and lack of emphasis on prevention and family support caused concern, particularly among Maori. As a result the new Minister of Social Welfare, the Hon Dr M Cullen, MP, announced yet another Working Party charged with the responsibility of making the Bill "simpler, more flexible, cheaper, and more culturally appropriate".15

The 1987 Working Party's Report was the foundation document of the 1989 Act. The Report discredited the perceived mono-cultural nature of the 1986 Bill, disbanded Child Protection Teams, and removed mandatory reporting and the paramountcy principle from the substantially redrafted Bill which became the Children Young Persons and Their Families Act 1989.

2. *Influences on the reform process.*

(a) *Cultural*

The influence of *Puao-te-Ata-tu* and a growing sensitivity to the principles of the Treaty of Waitangi provided a significant contribution to the new Act. The 1989 Act and its principal vehicle, the family group conference (FGC), codified the practice of "whanau decision making". This practice of calling upon the wider family group had been developed and utilised by social workers as a means of meeting the commitments of *Puao-te-Ata-tu* to a bi-cultural service:16

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15 P Tapp, D Geddis, N Taylor "Protecting the Family" *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 168, 174.

16 Department of Social Welfare, *Care and Protection Handbook*, 20.

> Maori challenged the prevailing concept of family which disregarded belonging to kin other than parents, and which ignored Maori heritage of Hapu and Iwi. They promoted the use of Maori processes in dealing with family crisis whereby all who belong to a child or young person share in decision making.

The merit of turning a cultural practice into not only a social work practice but also into a legal process is not without its critics. A model appropriate for Maori families was made applicable to all New Zealand families irrespective of ethnic origin.17

(b) *Economic*

Several key provisions in the 1986 Bill, while apparently removed because of their alleged inherent cultural insensitivity, were more likely removed because of their perceived cost. The 1987 Working Party's terms of reference to reduce the cost of the Bill were decisive in the removal of mandatory reporting and a multi-disciplinary approach to child protection.17a Government commitment to the empowerment of families and the extended definition of "family" were as much to do with the prevailing political rhetoric of cost cutting as heightened cultural awareness.

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17 Above n 15, 203.

17a Above n 15, 174.

(c) *DSW influences*

Tapp, Geddis and Taylor suggest that a majority of social workers provided vocal and active opposition to the 1986 Bill,18

> .., the majority viewed the Bill as an attack on their professional competence and as a threat to their power to make the final decisions with respect to individual cases of child abuse.

It is relevant that the 1987 Working Party, with the exception of leading family law academic Pauline Tapp, was staffed exclusively by DSW personnel. Whether the 1989 Act and its application has provided social workers with an exclusive power to make final decisions in the child abuse process will be discussed later in this paper.

II KEY ELEMENTS OF THE 1989 ACT

A *The Paramountcy Principle*

The principle that the interests of the child shall be treated as the "first and paramount consideration" was codified in the Children and Young Persons Act 1974.19 The 1986 Bill retained this principle. However, it was radically compromised by the 1989 Act. Essentially the interests of the child only become paramount if a conflict arises between the child's interest and the family's interest.20

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18 Above n 15, 178.

19 Section 4.

20 Section 6.

Tapp, Geddis, and Taylor state: "The philosophical trend toward family autonomy, coupled with the notion that 'the centrality accorded the child is not in keeping with Maori tradition' resulted in an unusual compromise in the 1989 Act."21

The notion that the paramountcy principle does not fit with Maori tradition was expressed in *Puao-te-Ata-Tu* "under this tradition the importance attached to the child's interests is subsumed under the importance attached to the responsibility of the tribal group..."22 Lesley Max points out that the exclusion of child paramountcy did not find universal acclaim among Maori. The "single largest representative grouping of tangata whenua, the Maori Women's Welfare League"23 was part of a coalition of groups "that made a last-ditch attempt in December 1988 to convince Dr Cullen to intervene in the committee stages of the Bill."24

The paramountcy principle has been described as "watered down" by the 1989 Act.25 It will be submitted that the practical effect of the Act's wide principles can provide for the absolute circumvention of the paramountcy principle.

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21 Above n15, 179.

22 Above n 14, Annex Two, 52.

23 L Max *Children: Endangered Species?* (Penguin Books, Auckland, 1990) 210.

24 Above n 23.

25 Above n 15, 183.

B *Reporting*

The concept of mandatory reporting has been a political football over the past decade. The 1986 Bill listed a number of professional groups who would be required to report.26 Mandatory reporting was excluded from the 1989 Act. The 1987 Working Party acknowledged that the majority of submissions it received supported mandatory reporting but it chose to highlight its disadvantages and recommended against it.

Once again deference to fiscal constraint and cultural sensitivity seem to have pre-empted the decision. Tapp, Geddis, and Taylor state:27

> the Select Committee was given an unambiguous direction to reduce costings. Because mandatory reporting was one of those elements with considerable financial implications, it was totally removed.

The 1989 Act provides for a discretionary form of child abuse reporting.28 Any person who believes that any child has been, or is likely to be, harmed, ill-treated, abused, neglected, or deprived may report the matter to a Social Worker or member of the Police. Provided the reporter discloses the information in good faith no legal action shall be taken against them.29

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26 Clause 17 listed the following professional groups - police, social worker, registered medical practitioner, plunket nurse, public health nurse, school dental nurse, registered psychologist, kindergarten teacher, early childhood centre workers, teacher, probation officer, foster care service/home employees, hospital board clinical staff and social workers, barristers and solicitors in private practice.

27 Above n 15, 180.

28 Section 15.

29 Section 16.

C *Decision Making*

The family group conference (FGC) is central to the decision making process of the 1989 Act. "Little decision-making can be done without the conference first being convened and having an opportunity to find a solution."30 Generally, an application to the court, seeking a declaration that the child is in need of care and protection cannot be made unless there has been a conference.31

The family group conference is a novel and unique mechanism to deal with families in the effective care of their children. The FGC gives practical expression to the general principles of the Act as well as the additional principles governing actions under the care and protection provisions.32 A key function of the care and protection FGC is to provide families with the opportunity to hear and discuss the issue(s) and to formulate and instigate a "plan" of action.

The decision making model with the family as focal point is a radical change from the multi-disciplinary approach being developed prior to the 1989 Act. The Child Protection Team concept, while never fully established on a national basis, "was the first constructive attempt to involve the community, including the professional community, in the identification of and response to 'at risk' children".33

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30 W Atkin "The Courts and child protection - aspects of the Children, Young Persons, and Their Families Act 1989" (1990) 20 VUWLR 319, 327.

31 Section 72(2) provides an exception in respect of any application to which s 70(2)(c) applies, namely where it is not possible to ascertain the whereabouts of the child's family, whanau, or family group.

32 Section 13.

33 Above n 11,50.

While Child Protection Teams disappeared as a formal form of decision making, they have been revived in an advisory capacity as Care and Protection Resource Panels.34

In order to determine how well the FGC serves the competing interests of its participants, an understanding of its process is required. The conference is preceded by a referral and preparation.35 The referral stage operates as a filtering process. Following the investigation of a report of child abuse, if a social worker or member of the police believes that a child is in need of care or protection, they must report the matter to a Care and Protection Co-ordinator.36 A referral of a care or protection case may also be made directly to a Care and Protection Co-ordinator by any body or organisation concerned with the welfare of children or by a court.37

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34 Section 428.

35 Reports are made to the Care and Protection Co-ordinator under s 18.

36 Section 14 provides the definition of a child or young person in need of care or protection.

37 Section 19.

Preparation involves the steps after the acceptance of a referral.38 The Care and Protection Co-ordinator, a newly established position under the 1989 Act, is the "gatekeeper", responsible for setting up and preparing for the conference. The Co-ordinator must fix the date, time and place at which the conference is to be held,39 making all reasonable endeavours to consult with the child's family, whanau, or family group when setting up the conference.40

The Co-ordinator also has a statutory duty to consult with a Care and Protection Resource Panel before convening a FGC.41

The functions of the family group conference are to:42

(i) consider care and protection matters regarding the child or young person;

(ii) make decisions, recommendations and plans to address any care and protection needs;

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38 Convening the conference includes all the steps after acceptance of the referral through to the formal notification of the time, date and place once these are set. This includes:
(a) consulting with the Care and Protection Resource Panel;
(b) identifying and contacting family group;
(c) gathering full information about the care and protection concern;
(d) notifying all entitled members; and
(e) consulting about procedure of the FGC under s 21(b) (iii).

39 Section 20.

40 Section 21. Consultation will be in relation to: (i) The date on which, and the time and place at which, the conference is to be held, and (ii) The persons who should attend the conference; and (iii) The procedure to be adopted at the conference.

41 Section 21(a).

42 New Zealand Children and Young Persons Service, Operations Information 1992/10, *Care and Protection Co-ordinator Practice and Policy Guidlines*, 41.

(iii) review the decisions made and the way they have been implemented.43

Section 22(1) lists people who are "entitled" to attend a conference. The list includes the child or young person, parents or guardians, members of the family, whanau, or family group, the care and protection co-ordinator, the social worker, member of the police, or representative of the referral agency, counsel for the child or lay advocate, the agent of the High Court where the child is under the guardianship of that court, and any person who attends in accordance with the wishes of the family. Professional advisors and information givers may attend the conference with the agreement of that conference.44

The FGC has three phases.45 In the first phase all available information and advice is shared with the conference. Information and advice givers are guests of the conference invited by the co-ordinator to ensure the FGC is fully informed. Time is given for discussion.

In the second phase family members of the conference are given time to deliberate in private.46 "Most of the non-family people "entitled" to attend the conference are not "entitled" to attend when the conference is engaged in "any discussions or deliberations".47

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43 Sections 28 and 29.

44 Section 23(2).

45 Above n 42, 43-45.

46 This gives practical effect s 22(2).

47 Above n 30, 329.

The only non-family member who retains the right to attend the conference without the necessary request of the family is an agent of the High Court. Department of Social Welfare guidelines advise co-ordinators to decline any initial request to partake in family deliberations.48 It is a time for family to discuss in private all the issues raised and to brainstorm ideas to address them. The family has a right to agree to disagree that a care and protection problem exists.49

The third phase involved the formulation of decisions, recommendations and a plan which must be agreed to by all entitled members. The family and the co-ordinator together decide whether the child or young person has the maturity to participate in decision-making.50 The co-ordinator is an entitled member of the conference and in rare situations can veto decisions, recommendations, and plans. If the conference cannot agree, the matter is referred back to the referring agency, sometimes to DSW, and may go to the Family Court.

Following agreement at the FGC the co-ordinator must seek formal agreement of the referring agency (departmental social workers, police and certain other agencies represent the care and protection concern) and of every person who will be directly involved in implementing the plan.51

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48 Above n 42, 44.

49 Above n 42, 45.

50 Above n 49.

51 If the Court referred under s 19 the Court is simply informed of the decisions, recommendations and plans but is not asked to agree or otherwise (s 30(1)(b)).

The ability of the referring agency to reject the decisions, recommendations, and plans of the FGC is limited to where they are clearly impractical or not in keeping with the principles of the Act.

A function of the FGC is, from time to time, to review the decisions, recommendations and plans made and to review progress on the implementation of the plans.52 It is the duty of the care and protection co-ordinator to ensure that any decision, recommendation or plan made is reviewed regularly.53

III REVIEW OF THE 1989 ACT

A *The Mason Report*

In July 1991 the Minister of Social Welfare, Hon J Shipley, MP, appointed a Ministerial Review Team to investigate and report on the implementation of the Children, Young Persons and Their Families Act 1989. The Review Team, comprised of retired Judge Ken Mason, Georgina Kirby and Robin Wray, submitted their report to the Minister of Social Welfare in February 1992. The Mason Report, along with the Government's Response,54 was released to the public in May 1992.

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52 Section 28(c).

53 Section 424(f).

54 *The Government's Response to the Report of the Ministerial Review Team,* 1992.

Some of the Review Team's more contentious recommendations relate to provisions which were removed from the 1986 draft Bill by the 1987 Working Party. The Mason Team's recommendations include: an "unequivocal restatement of the paramountcy principle;"55 provision for the mandatory reporting of child abuse; and the amendment of section 22(1) to entitle Care and Protection Resource Panels to representation at any FGC "for the purpose of placing any information or advice it deems appropriate and which will enable the conference to carry out its functions".56

The Government in its Response declined the Mason Team's latter recommendation, stating it is satisfied with the current role of Care and Protection Resource Panels.57 With regard to the former recommendations the Government decided to give more consideration, research and consultation.

B *Children Young Persons and Their Families Amendment Bill.*

The Amendment Bill, introduced on the 10 August 1993, contains, among its more substantive amendments, a restatement of the paramountcy principle58 and provision for the mandatory reporting of child abuse.59 Government commitment to these two amendments is unclear.

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55 Above n 11, 12.

56 Above n 11, 58.

57 Above n 54, 19.

58 Clause 3.

59 Clause 4.

The Minister of Social Welfare, Hon J Shipley, MP, in her speech introducing the Bill acknowledged that political as well as professional and public opinion is divided with regard to mandatory reporting.60 The Minister stated that "the Government will be guided by the weight of evidence at the select committee".61

If enacted mandatory reporting will become effective from 1 July 1995. The government considers it necessary to provide time to mobilize appropriate resources and to prepare mandated reporters for the responsibility of compulsory reporting. Other amendments contained in the Bill are, some what optimistically, due to come into force on 1 January 1994.

The timing of the Amendment Bill is disappointing. Following its introduction the Bill has been referred to select committee. Progress will necessarily be impeded by the November 1993 general election. The government received the Mason Report in February 1992, yet it has taken until August 1993 to introduce the legislation. In a cynical vein it could be suggested inclusion of mandatory reporting and the Bill's timing is tantamount to political gerrymandering. An attempt by the government to signal to the electorate that it is doing something about violence in society.

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60 NZPD, no 85, 17307, 10 August 1993.

61 Above n 60.

C *Philosophy of Reform*

The care and protection provisions of the 1989 Act govern the inter-relationship between three interdependent interests - the welfare of children, family privacy and autonomy, and the role of the State in personal life. Freeman aptly states, "striking the right balance between autonomy and social intervention remains a pre-eminent policy decision for all concerned with family matters".62 The 1989 Act reflects the non-interventionist policy model, a model" commonly espoused in the past but in seeming decline until its... activation by neo-conservatives such as Goldstein, Freud and Solnit."63

The minimum intervention principle is enshrined in the 1989 Act.64 It permeates the Act in other ways, for instance in the principle that a child should be removed from his or her family only if there is a serious risk of harm.65 The focus of the Act is to keep the family united" and to develop strategies to improve family dialogue and interaction which will allow children to stay within the family network".66

Lesley Max describes the Children, Young Persons and Their Families Act 1989 as "an article of faith"67 and suggests that in some respects the law as it relates to the protection of children is defective both in principle and practice.

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62 MDA Freeman *The Rights and Wrongs of Children* (Francis Pinter, London, 1983) 244.

63 Above n 62.

64 Section 13(b) (ii).

65 Section 13(c).

66 G McGirr *A Literature Review of Long-Term Outcomes of Care and Protection Action (Department of Social Welfare, Research Unit, 1993)9.*

67 L Max "An Act of Faith: Parent's Rights and Children's Welfare" *New Zealand Law Society Family Law Conference Papers (1991)* 66, 67.

The Act rests on the premise that if you "empower families by requiring them to consider the circumstances of abuse and neglect and how the hurt child may be better provided for, the decision arrived at will be in the child's best interest".68 The reliability of this premise is uncertain since there has been no research done to prove or disprove its validity.

A review commissioned by the Social Policy Agency of the Department of Social Welfare to identify and assess current international literature on long term outcomes for children who have been subject to statutory care and proceedings states, "it has been very difficult to find literature that specifically measures long-term outcomes of care and protection action".69 Wald warns:70

> While laws and child welfare policies have changed substantially over the years, these changes are engendered primarily by ideology and theories of child development, not data about the impact of various policies on children.

Wald reiterates this point, stating:71

> I have long supported in-home services. I think, however, that the present preference for minimizing state intervention is based largely on ideology and theory, rather than on evidence that foster care is worse for children or that an abused or neglected child's development can be adequately protected at home.

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68 Above n 67, 68.

69 Above n 66, 24.

70 M Wald "Family Preservation: Are We Moving Too Fast?" (1988) Public Welfare, Summer, 34.

71 Above n 70, 36.

These comments are significant given that Wald, "is a well known advocate of non-intervention into the family".72

1 *Measuring Success*

In the New Zealand context the Commissioner for Children in 1991 stated, "Despite the problems of implementation, the results of the New Zealand experiment appear very positive".73 The percentage of agreements reached within FGC's is high (90 per cent in the first year).74 This suggests the vast majority of families are prepared to work together at conferences and reach a decision. However, the high percentage of agreements cannot be relied upon as a complete yardstick of success. Lesley Max states, "there is great unease at the fact that a Family Group conference is rated a success if agreement is reached".75 "What the outcomes are in terms of quality of care for the children is by no means clear".76

In his submissions to the Mason Review an experienced counsel in the Family Court commented:77

> ...in the absence of subsequent monitoring and in the knowledge of the threadbare resources of the Department in providing ongoing 'support' there is little qualitative data available to reinforce the notion of 'success'.

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72 M Henaghan "The 'Rights' of Children When Decisions Are Made About (them) and Which Affect the Welfare and Interests of Children" *New Zealand Law Society Family Law Conference Papers (1991)* 48, 63.

73 *A Briefing Paper: An Appraisal of the First Year of Operation of the Children, Young Persons and Their Families Act 1989* (Office of the Commissioner for Children, June 1991)11.

74 Above n 73, 17.

75 Above n 67.

76 Above n 73, 7.

77 Above n 11, 20.

An agreement may be reached about the placement of a child but how do we know it is in the child's interests? "Should we, and can we always rely on the decision makers to take the interests of the child into the decision making process, particularly when decision makers will have their own interests at stake?"78 Michael Wald recognises the need to treat innovative family preservation programmes which claim high success rates with a degree of caution. He states:79

> It seems to me, however, that many of these programs aim for a very limited kind of success. Their primary goal and the primary measure of their success - is the prevention of removal. More over, the need for removal seems to be defined in terms of preventing serious harm to the child. If a child can be left at home without being seriously abused or neglected, the intervention is deemed successful.

Thus, family preservation programmes such as the family group conference can work well only if its goals are limited "and we are willing to accept that children, though protected from severe harm, will remain at risk of poor academic, social, and emotional development".80

2. *Realigning the balance between Family and Child*

Recognising the benefit of family preservation, the need for continuity and the importance for families to work together to confront issues and seek solutions are all key attributes of the 1989 Act. However, as Wald warns, "family preservation cannot be an end in and of itself.

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78 Above n 72, 49.

79 Above n 70, 37.

80 Above n 70, 38.

The goal of intervention must be the child's well-being - and family preservation is appropriate only when it serves to protect and promote this goal."81 An inherent danger in both the principles and practice of the 1989 Act is that children's interests are vulnerable to and compromised by the family preservation ethic. Max states:82

> The irony is in that in correcting one power imbalance, another was reinforced, namely the power imbalance between parent and child. The paramountcy of the child has certainly been undermined in favour of the family in both the spirit and the practice of the new Act.

This power imbalance mentioned by Max is well insulated in the New Zealand context by adherence to the principle of non-intervention. In reference to the Childrens Act 1989 (UK) but of equal relevance to the Children, Young Person and Their Families Act, Andrew Bainham has stated:83

> This danger of having an over arching principle, or philosophy of non-intervention is that children's interests will become too closely identified with those of their parents and that the role of the state, in protecting the independent interests of children, will be undermined.

The relationship between the welfare principle and the non-intervention principle is underlined by tension. The welfare principle, by making the interests of children paramount, prioritises those interests over the interests of adults. Conversely the non-intervention principle accords primacy to the interests and wishes of adults. "In particular, it is concerned with protecting the autonomy of parents and upholding family privacy against what is seen as unjustified interference by the State"84

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81 Above n 80.

82 Above n 67.

83 A Bainham "The Children Act 1989: Welfare and Non-Interventionism" April (1990) Fam Law 143, 145.

84 Above n 83.

"At the heart of the matter lies a judgment about the relative weight or importance which a society should accord to the protection of children and respect for adult liberties"85

The "hands-off" approach currently exercised in New Zealand fails to recognise that:86

> The parent/child relationship is an unequal contract, which children do not enter freely. At the same time, both children and the society as a whole have a vital interest in the success of that relationship, in cultivating the capacity for responsible moral action.

Over-arching faith in the family, coupled with State non-intervention as exercised in New Zealand does not amount to responsible moral action. It is submitted that the 1989 Act requires a realignment of the principles which guide it. The minimal intervention and family autonomy principles can dangerously override the welfare and rights of children. Children's interests are too readily defined and subsumed within the family's interests. The interests of children under the 1989 Act need to be prioritised. This requires a re-evaluation of the Act's principles.

The Minister of Social Welfare has acknowledged that despite the increase in reports of child abuse in recent years, a significant number of cases still go unreported.87 Early recognition and referral is considered a key ingredient in the effective management of child abuse.88 Mandatory reporting is consistent with, and enhances this principle. It signals that the law is responsive to the need to identify risks of child abuse.

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85 Above n 83.

86 J Eekelaar, R Dingwall, T Murray *The Protection of Children-State Intervention and Family Life* (Basil Blackwell Publisher Ltd, London, 1983).

87 See "Boost to child-abuse awareness" *The Evening Post*, Wellington, New Zealand, 20 August 1993,2.

88 Above n15, 168.

The Mason Team's proposal to introduce mandatory reporting and its inclusion in the Amendment Bill to the 1989 Act can be seen as an attempt to swing the pendulum of family law policy back in the direction of securing the best interests of the child.

Child Protection Teams were resented in some circles for allegedly allowing professionals to dominate the decision making process in cases involving allegations of child abuse. The question now is whether families can dominate the process, to the detriment of their children, and ultimately the family/whanau itself.

The issue is essentially one of balance. Family/whanau participation in dealing with child protection is a positive aspect of the 1989 Act. The question is how well the Act and its application by social workers and officials involved in the FGC process strikes a balance between the interests of children and the rights of parents and family autonomy.

An inherent danger with the FGC process is the potential to strengthen the power of the very people who are abusing children. Max states: "The families are given the power, sure enough, but they aren't given the skills. Surely empowering without enskilling is a dangerous process".89

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89 Above n 67, 68.

3 The need for support

Danger is compounded by fiscal constraint and continued low levels of social worker qualifications and training. With regard to the former, Isabell Mitchell has stated: "There is a very real concern that fiscal constraints will see the needs and rights of children being subrogated to the fiscal distates of Treasury".90

Mitchell recognises that it is the calibre of the personnel at the FGC which "really determines whether or not the welfare of the children is the true focus and indeed whether the children's needs are able to be met appropriately within the extended family."91 The Mason Report highlighted the fact that the success of the Act's procedures in dealing with reported cases of abuse is largely contingent upon the work and competency of social workers.

Empowerment of social workers and departmental officials has wide ranging implications for children. At the investigation stage, following a report or referral, a social worker determines whether a child is in need of care or protection and whether a case should be referred to a care and protection co-ordinator. The co-ordinator in turn is vested with considerable power; deciding in consultation with family/whanau, who should be invited to attend a conference; deciding what information and advice should be available to the conference; and the power of veto over any decision at a FGC (the social woker in his/her capacity of "referring agency" also has this power).

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90 I Mitchell "Children's Needs in Practice" *New Zealand Law Society Family Law Conference Papers (1991)* 75, 77.

91 Above n 90, 75.

In the light of these important powers, dangerously low levels of qualified social workers remains a matter of grave concern. In May 1992, 296 social workers, out of 1,047 held a social work qualification.92 Notwithstanding the appointment of eighty-seven social work graduates to the year ended 30 June 1993, of 1,079 people actively engaged in social work for the New Zealand Children and Young Persons Service, only 252 social workers and 36 practice consultants hold a tertiary social work qualification.93 These figures suggest that the turnover of qualified social work staff remains high. It is submitted that the present level of qualified social workers should be kept in mind when considering changes to the FGC decision making process.

The need for a "watchdog" at the FGC, to ensure the needs of children are met, is imperative. Mitchell states: "In my experience children's rights are often compromised when there is no "watchdog" to ensure that their interests are made the paramount consideration".94 An expanded role for Resource Panels would ensure any one FGC is presented with the necessary advice and information and would also provide "an ideal check and balance to ensure the child's interests and welfare have been fully considered".95

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92 Department of Social Welfare, *Annual Report* (Fiscal, 1992) 18.

93 Department of Social Welfare, *Annual Report* (Fiscal, 1993) 36.

94 Above n 90, 78.

95 Above n 72, 64.

The Mason Team acknowledged regional variances in how well FGCs were run. A common thread being that where Care and Protection Resource Panels enjoyed a good relationship with social workers and co-ordinators a multi-disciplinary approach to any one case was much more likely. The use of Resource Panels is imperative for the provision of multi-disciplinary knowledge, and as a counter balance to the power inequalities which currently exist. Resource Panels, in their advisory capacity, have not been well utilised.96 It is submitted their role should be enhanced under the 1989 Act to provide the investigative and decision making processes with greater balance.

Perhaps the greatest danger facing the operation of the 1989 Act is best put in the words of Judith McMullen, again in reference to United States law, but equally relevant in the New Zealand context. McMullen states: "While championing privacy and autonomy, we have, in reality imposed and reinforced social isolation".97

IV PRINCIPLES

The Minister of Social Welfare, Hon J Shipley, MP, in the introduction to the Governments Response to the Mason Report98 stated: "I have always believed that the basic philosophy, objects and principles of the Act are sound and I am pleased to find this view confirmed by the Review Team"99.

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96 For example, the Commissioner for Children found in 1990 Resource Panels were consulted in only 61% of cases during a 6 month period. In the 1993 fiscal year the number of consultations by social workers was significantly lower than the total number of notifications received. See the discussion below.

97 Above n 1, 598.

98 Above n 54.

99 Above n 54.

The Minister reiterated these comments recently in Parliament when introducing the first reading of the proposed Amendment to the 1989 Act.100 The Mason Team acknowledged "investment in the Act to date has been worthwhile",101 but reference to the principles of the 1989 Act, section 6 aside, is conspicuous by its absence.

The principles of the Act are fundamental, having a major influence on the Act's practical operation. Incorporation of principles in separate sections, as opposed to reference in the Long Title of the Act, is an example of recent changes in legislative drafting. This form of drafting is not without its difficulties. The wide and sometimes conflicting principles in the Act can be problematical. As Atkin points out, "there are at least 18 principles for care and protection, more if the principles which really contain more than one idea are divided".102 In deciphering Parliament's intention Atkin acknowledges there is "plenty of material upon which to draw, but maybe it is more an embarrassment of riches as the principles often tug in different directions".103 The Acts diversity of principles prompted Max to describe it as "an Act For All Seasons".104

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100 Above n 3.

101 Above n 11, 191.

102 Above n 30, 322.

103 Above n 30, 322-323.

104 Above n 67.

The wording of the 1989 Act was chosen in an attempt "to balance both the interests of the child and the importance of Family in the overall context of the Act".105 This apparent balance is given statutory effect by using the concept of family as the means of assuring the child's interest. The 1989 Act, as with its United Kingdom counterpart, starts with the assumption that a child's best interests lie in the preservation of a viable natural family. The Title of the Act, setting out specific aims, gives primacy to advancing the wellbeing of families. The wellbeing of children, significantly, is seen through the lens of children "as members of families, whanau, hapu, iwi and family groups". Atkin states: "The main thrust of the Title is therefore the interests of families and children come into the picture only as part of a family".106 It is submitted paragraph (a) of the Long Title to the 1989 Act should be amended to read:

(a) To advance the wellbeing of children and young persons and the wellbeing of families and to ensure care and security for children in need.

This "main thrust of the Title" permeates the Act itself. In reference to section 5, for example, Atkin states:107

> The welfare of the child is coupled with the stability of the family, which arguably means that they are to be read together. In other words, the welfare of the child is not to be seen in isolation from family stability but only as part of it.

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105 Above n 54, 1.

106 Above n 30, 321.

107 Above n 30, 323.

This writer does not dispute the merit or desirability of maintaining the child, where it is in that child's best interests, within the family/whanau. However, it is submitted the 1989 Act subsumes the interests of children within the family's interest to such an extent that the Act fails to recognise when the interests of children and parents conflict, and when they converge. The Mason Team warned:108

> The real danger is that with the emphasis on family group decision making in the Act, there will be no perceived conflict with the interests of the child provided all family members agree.
> ... Given that all care and protection proceedings involved a potential conflict between the families interests and the need to protect children, it is necessary in ALL cases to look separately at the interests of both the family and the child and to hold the latter paramount.

The Mason Team provided an example in its Report of the outcome of a FGC held in respect of a 13 year old girl who had been assaulted by her step-father.109 "The conference agreed to organise some long term and intensive counselling for the couple, a medical referral was made for the mother and the extended family resolved to come together and support the marriage".110 The Mason Team expressed its concern that the parents interests overrode the wellbeing of the child. The Mason Report states:111

> ...,we understand that little information was placed before the conference regarding the long term effects of the assaults perpetrated on her nor, apparently, was any long term counselling programme implemented for her benefit.

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108 Above n 11, 11.

109 Above n 11, 10.

110 Above n 109.

111 Above n 109.

The problem is compounded by the Act's failure to provide sufficient weighting for its principles. The widely stated principles are vulnerable to manipulation and call for social workers and co-ordinators to make value judgements. An example of the conflict which can arise between the principles of the Act is illustrated by the time taken to convene a FGC after acceptance of a referral. Tension, admittedly difficult to overcome, exists between ensuring as many family members as possible attend,112 and convening the conference as quickly as possible.113

The time lag between acceptance of a referral by a co-ordinator under either section 18 or 19 and the holding of a conference has been surveyed on average to be 36 days.114 The Department of Social Welfare's current target is 30 days.115 The time taken to convene a conference illustrates how the principles of the Act can be manipulated or given undue weight:116

> Several people have commented that some Departmental social workers place undue emphasis on the principle that intervention into family life should be the minimum necessary to ensure the safety and protection of a child or young person. They argue that when carried to extremes, this is mere time wasting which is disguised as "good preparation".

The Mason Team accepted that while this may be a somewhat cynical view they had seen and heard of "sufficient examples to conclude there is some merit in the argument".117

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112 Section 5(a).

113 Section 5(f).

114 K Paterson, M Harvey "*Organisation and Operation of Care and Protection Family Group Conferences*" (Department of Social Welfare, Wellington, 1991) 20.

115 Above n 92, 19.

116 Above n 11, 35.

117 Above n 116.

A *Section 5*

1 Recommended legislative amendment

General Principals

5. **Principals to be applied in exercise of powers conferred by this Act** - Subject to section 6 of this Act, any Court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:

(a) The principle that, wherever possible, a child's or young person's family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group:

(b) The principle that, **unless compatible with the child's or young person's best interests**, the relationship between that child or young person and his or her family, whanau, hapu, iwi, and family group should be maintained and strengthened:

(c) The principle that consideration must always be given to how a decision affecting a child or young person will affect-
(i) The welfare of that child or young person; and
(ii) The stability of that child or young person **within that child's or young person's** family, whanau, hapu, iwi, and family group:

(d) The principle that consideration should **always** be given to the wishes of the child or young person, **the wishes should be given due weight in accordance with the age and maturity of the child:**

(e) The principle that endeavours should be made to obtain the support of-
(i) The parents or guardians or other persons having the care of a child or young person; and
(ii) The child or young person himself or herself - to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(f) The principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time frame appropriate to the child's or young person's sense of time.

(g) **The principle that any delay is likely to prejudice the welfare of the child.**

2 *Comment*

Section 5 lists the general principles which are to be applied by any court or person who exercises any power conferred by the Act. The proposed amendments listed above are an attempt to introduce a clearer focus to these principles. Even with a restatement of the paramountcy principle in section 6 it is considered necessary to consolidate children's interests within appropriate subsections of section 5. This is especially important in the light of the wording of the new section 6 contained in the Amendment Bill currently before Parliament.118 The paramountcy principle will be qualified, "having regard to the principles set out in sections 5 and 13 of this Act".119

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118 See s6 discussed below.

119 Clause 3.

Even if the paramountcy principle is restated, as is the writers preference, without the qualification of being subject to sections 5 and 13, problems of weighting could arise. The Children Act 1989 (UK) retained the paramountcy principle but Bainham suggests, even with its inclusion, the interests of children are not necessarily secure. Bainham states:120

> The non-interventionist stance taken in so many of the Act's provisions will mean that parental wishes, especially where both parents are in agreement, will determine an increasing number of issues affecting children. No doubt this is in the interests of parents but whether it is also in the interests of children is more debatable.

This highlights the inherent conflict in a statute which aims to protect children and simultaneously respect family autonomy. As Bainham points out: "There is no reason in principle why adult interests should not be preferred on various issues".121 For example, the interests of children are not relevant to the question of whether a divorce should be granted. The point of the writers suggested legislative change above, is to ensure that in the area of care and protection of children, it is the interests of children on whose side the law errs.

The Family Court has shown a preparedness to read the general principles contained in section 5 as being subject to the welfare and interests of the child. The first two principles of section 5 are prefaced by the words "wherever possible". This has been interpreted by the Court to suggest that "the principles are not to be promoted at all costs. The

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120 Above n 83.

121 Above n 83.

range of what is 'possible' will be circumscribed by the welfare and interests of the child".121a

Emphasis of the proposed legislative change is to provide greater recognition to the interests and welfare of children isolated from family interests. Only two of the six principles in section 5 deal separately with the child. These are that consideration should be given to the wishes of the child so far as they can be ascertained (wishes to be given such weight as is appropriate having regard to the age, maturity, and culture of the child),122 and that decisions should be made having regard to the child's time-frame.123

The United Nations Convention on the Rights of the Child 1989 is relevant to a discussion of the 1989 Act's principles. The convention was signed by New Zealand in 1989 and ratified in April 1993. Article 12 of the Convention provides that any child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child. Pauline Tapp suggests that: "The emphasis in the Children, Young Persons, and Their Families Act 1989 on the child as a member of a family results in a breach of Article 12".124 It is submitted that the perception of the child as an integral part of a family detracts from the right of children to be heard as individuals.

121a P R H Webb et al *Family Law in New Zealand* (5 ed, Butterworths, Wellington, 1992) 6812; see *Re V* Unreported, 13 March 1991, Family Court, Napier, CYPF 041 033 90.

122 Section 5(d).

123 Section 5(f).

124 P Tapp (1992) NZ Recent Law Review 143, 144.

Suggested amendment to paragraphs (b), (c)(ii) and (d) are an attempt to accord children individual status in section 5's principles.

It is submitted that reference to "culture" in paragraph (d) of section 5 should be removed. Qualifying the child's wishes on the basis of "culture" exceeds the bounds of political correctness. As Atkin aptly asks "Does this mean that the wishes of a mature child can be ignored if this is consistent with the child's ethnic background?"125 Henaghan suggests that inclusion of "culture" in section 5(d) creates a "sliding scale" regarding the weight attributed to a child's wishes.126 If the child comes from a culture which is perceived to give children less say in decision making then that child's view will hold less weight than if the child was from a culture which gives children more say in decision making. "This sliding scale according to culture seems totally inconsistent with the UN declaration".127 As Henaghan points out, the UN Convention was written to apply to all children. Article 2 of the Convention states that parties "shall respect and ensure the rights set forth... irrespective of the child's or his or her parent's or legal guardian's race, colour, sex language, national, ethnic or social origins, property, disability, birth or other status".

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125 Above n 107.

126 Above n 72, 54.

127 Above n 126.

The inclusion of paragraph (g) aims to encourage greater urgency in the time taken to convene FGC's and with procedures carried out under the Act generally. Department of Social Welfare Guidelines for co-ordinators state that FGC be convened within 30 working days from the date the decision is made to convene a conference.128 Accepted referrals which have not proceeded to a FGC 12 weeks after acceptance must be referred to the Care and Protection Resource Panel for further consultation. The guidelines are silent with regard to accountability for not keeping within the 30 day time frame. It is submitted referral to Resource Panels not until 12 weeks after acceptance is both unacceptable and contravenes section 5 (f).

Consultation with Resource Panels is already a statutory requirement of the Act when convening conferences, so a Resource Panel should have some knowledge of any difficulties which arise in convening a conference.129 Regardless of this, any extension over the set period should involve an automatic consultation with the Resource Panel. It is submitted that this consultation should be accompanied with good reasons in writing. This procedure would aid the Resource Panel to identify and provide the necessary resources to resolve any delay and would engender a degree of accountability from departmental social workers and co-ordinators in the time taken to convene a conference.

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128 Above n 42, 9.

129 Section 21.

The Mason Team recommended that the time period between acceptance of a referral and holding a conference should be a maximum of 21 days. While the writer supports this time frame, its implementation, in view of the current resources provided to the Department of Social Welfare, may be unrealistic.

B *Section 6*

1 Recommended legislative amendment.

6. **Welfare and interests of child or young person paramount** - In the administration or application of this Act (other than Parts IV and V and sections 351 to 360), **the welfare and interests of the child or young person shall be the first and paramount consideration.**

2. Comment

In its present form section 6 provides that where any conflict of principles or interest arises, the welfare and interest of the child or young person shall be the deciding factor. The courts have interpreted section 6 as a restatement of the paramountcy prinicple.130 The Mason Team expressed concern that social workers and participants in the care and protection process, in deference to the family ideology of the Act, too readily circumvent the application of section 6. The Mason Report states:131

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130 Richardson J has stated, obiter dicta, that s 6 is but a "contemporary restatement" of the paramountcy principle espoused in s 23 of the Guardianship Act 1968, see *D-GSW v L* (1990) NZFLR 125, 169; see also *D-GSW v H* (1991) NZFLR 373, 374.

131 Above n 108.

> All too readily Co-ordinators, social workers and participants in the FGC refuse to acknowledge a conflict of principles or interests in situations where one clearly exists. Consequently, where a conflict is not acknowledged, the welfare and interests of the child or young person do NOT become the deciding factor in the outcome of the Conference.132

The Mason Team used very strong language in its calls for the reinstatement of the paramountcy principle:133

> Never before in New Zealand child protection legislation has the need been greater for a strong statement in support of the interests of children and young persons. The idea of bringing the wider whanau and other players under the umbrella of the Act has increased the number of competing interests, and in our view has rendered the child or young person increasingly vulnerable.

The Children, Young Persons and Their Families Amendment Bill repeals section 6 and purports to restate the paramountcy principle in unequivocal terms.134 The wording of the new section 6 is similar to the writer's recommended amendment above, with one important difference. As already mentioned section 6 in the Amendment Bill contains the qualification, "having regard to the principles set out in sections 5 and 13 of this Act". While the amendment is more assertive in favour of the interests of children, subjecting the paramountcy principle to the principles as presently stated in the Act may do little more than maintain the status quo. It is conceivable that a social worker could justify a decision not necessarily in the best interest's of the child on the basis that it is in accord with the principles of the Act.

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132 See also Henaghan, above n 72, 60.

133 Above n 55.

134 Clause 3.

It is submitted that section 6 should be amended to recognise that the interests of the child or young person must be the first and paramount consideration, without qualification. The present wording and practical application of section 6 contravenes the United Nations Convention on the Rights of the Child. Article 3(1), which provides all actions concerning the child shall take full account for his or her best interests, is not sufficiently endorsed by the present section 6. The best interests of the child only accrue if there is a conflict of principles or interests, "and is thus a fallback or secondary, rather than a primary consideration".135 Despite the reservations mentioned above, the amended section 6, contained in the Amendment Bill would not contravene article 3(1) of the UN Convention.

Allegations that the paramountcy principle is culturally insensitive were sternly rejected by the Mason Team. It was acknowledged that the ministerial advisory committee report, *Puao-te-Ata-tu*, itself recognised: "There need be no inherent conflict between that (the paramountcy principle) and the customary preference for the maintenance of children within the hapu".136

Speaking during the introduction of the Amendment Bill, the Hon Dr M Cullen, MP, reiterated the cultural argument against the paramountcy principle.137 Dr Cullen stated:138

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135 Above n30, 324.

136 Above n 133.

137 NZPD, no 85, 17321, 10 August 1993.

138 Above n 137.

> The reason we moved away from the blunt statement that this Bill wishes to put back in was that it was absolutely clear that we ran into some major problems with Maori and Pacific Island groups particularly, which did not see it as correct in principle for the issue of the child to be always divorced and separate from the issue of the family.

Yet, as already discussed in this paper, it is necessary in all cases to look at the interests of both the family and the child separately. Indeed, even under the present section 6 which was enacted when Dr Cullen was Minister of Social Welfare, it is necessary to look at both interests to fairly determine whether a conflict exists between the respective interests of family and child.

Lesley Max aptly asks:139

> Do we have to go from the extreme position wherein Maoriness counted for very little to a position at the other extreme where only a child's Maoriness counts?...
> Just as it was indefensible, and it was indeed institutional racism, that in the past there has been minimal attention paid to Maori perceptions of the place of the child in relation to whanau, hapu and iwi, is it not also indefensible, and in fact institutional 'childism', to pay minimal attention to the child's needs as a child?

Reinstatement of the paramountcy principle represents a focussed commitment to the welfare of children and a challenge to the mindsets of family autonomy and non-intervention which have pervaded the Act's operation. It cannot be assumed that conflicts inherent in the Act's principles will be avoided. Indeed the inherent inconsistency between the paramount welfare and interests of the child and minimal intervention becomes more pronounced. The desired effect is that those working under the Act will err, not on the side of family autonomy, but children.

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139 Above n 23, 212.

C *Section 13*

1 Recommended legislative amendment

PART II

CARE AND PROTECTION OF CHILDREN AND YOUNG PERSONS

Principles

13. **Principles** - Subject to sections 5 and 6 of this Act, any Court which, or person who, exercises any powers conferred by or under this Part or Part III or sections 341 to 350 of this Act shall be guided by the following principles:

(a) The principle that children and young persons must be protected from harm, their rights upheld, and their welfare promoted:

(b) The principle that the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whanau, hapu, iwi, and family group, and that accordingly -
(i) A child's or young person's family, whanau, hapu, iwi, and family group should be supported, assisted, and protected as much as possible; and
(ii) Intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection:

(c) The principle that it is desirable that a child or young person live in association with his or her family, whanau, hapu, iwi, and family group, and that his or her education, training or employment be allowed to continue without interruption or disturbance:

(d) Where a child or young person is considered to be in need of care or protection, the principle that, **where compatible with the child or young persons best interests**, the necessary assistance and support should be provided to enable the child or young person to be cared for and protected within his or her own family, whanau, hapu, iwi, and family group:

(e) **The principle that when considering whether a child or young person should be removed from his or her family, whanau, hapu, iwi and family group regard should be had to -**
(i) Any harm which he or she has suffered or is at risk of suffering;
(ii) The likely effect on the child or young person of any change in circumstances;
(iii) How capable his or her family, whanau, hapu, iwi, and family group, is of meeting his or her needs:

(f) Where a child or young person is removed from his or her family, whanau, hapu, iwi, and family group, the principles that,-
(i) Wherever practicable, the child or young person should be returned to, and protected from harm within, that family, whanau, hapu, iwi, and family group; and
(ii) Where the child or young person cannot immediately be returned to, and protected from harm within, his or her family, whanau, hapu, iwi and family group, until the child or young person can be so returned and protected he or she should, wherever practicable, live in an appropriate family-like setting -
(A) That, where appropriate, is in the same locality as that in which the child or young person was living; and
(B) In which the child's or young person's links with his or her family, whanau, hapu, iwi, and family group are maintained and strengthened; and
(iii) Where the child or young person cannot be returned to, and protected from harm within, his or her family, whanua, hapu, iwi, and family group, the child or young person should live in a new family group, or (in the case of a young person) in an appropriate family-like setting, in which he or she can develop a sense of belonging, and in which his or her sense of continuity and his or her personal and cultural identity are maintained:

(g) Where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that, in determining the person in whose care the child or young person should be placed, priority should, where practicable, be given to a person -

(i) Who is a member of the child's or young person's hapu or iwi (with preference being given to hapu members), or, if that is not possible, who has the same tribal, racial, ethnic, or cultural background as the child or young person; and
(ii) Who lives in the same locality as the child or young person:

(h) Where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that the child or young person should be given an opportunity to develop a significant psychological attachment to the person in whose care the child or young person is placed:

(i) Where a child is considered to be in need of care or protection on the ground specified in section 14(I)(e) of this Act, the principle set out in section 208 (g) of this Act.

2 *Comment*

While the writer has reservations about paragraph (b) (ii), those reservations relate to the way the minimum intervention principle has been applied and it receiving undue weight, rather than the words themselves.

It is submitted the words "wherever practicable" in paragraph (d) do not adequately address the need to ensure the child or young person's individual rights and welfare are considered.

Paragraph (e) of section 13 states that a child or young person should be removed from his or her family, whanau, hapu, iwi, and family group only if there is a serious risk of harm to the child or young person.

Lesley Max describes this threshold as a "demonstrable weakening of the 1974 Act which required the Director-General of Social Welfare to take steps to prevent children and young persons from being exposed to unnecessary suffering or deprivation..."140

The threshold of "serious risk of harm" before the Department of Social Welfare will remove a child is similar to, but less onerous than the fifth of Goldstein, Freud and Solnit's grounds for intervention posited in *Before the Best Interests of The Child*.141 Nevertheless, the "serious risk of harm" standard is too narrowly drawn and in Freeman's words gives us "some critical insight into the problems of line-drawing".142 For example, it is conceivable that a parent who beats his or her child risks having that child removed but a parent who locks his or her child in a cupboard for hours on end will be immune from State removal of that child.

The interests of children are made more vulnerable by the inherent uncertainty as to what constitutes a "serious risk of harm". Furthermore, failure to intervene in cases of less than a "serious risk of harm" may result in danger signs not being picked up". As is well known, minor injuries often forewarn of more dangerous traumas".143

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140 Above n 23, 245.

141 J Goldstein, A Freud, A Solnit *Beyond The Best Interests of The Child* (revised ed, Free Press, New York, 1979) 72. Goldstein's et al fifth ground for intervention is "serious bodily injury inflicted by parents upon their child, an attempt to inflict such injury or the repeated failure of parents to prevent their child from suffering such injury".

142 Above n 62, 250. Freeman referring to Goldstein et al standard of "serious bodily injury".

143 Above n 62, 255.

It is submitted that the threshold of "serious risk of harm" before DSW will remove a child or young person from his or her family/whanau is too high. While section 13(a) states "the principle that children and young persons must be protected from harm, their rights upheld and their welfare promoted", section 13(e) in its present form imposes a significant qualification, since a child can only be removed from the family, whanau, hapu, iwi and family group if there is a serious risk of harm to the child.

The proposed amendment of section 13(e) purports to address the question of whether a child should be removed from his or her family/whanau on a more rounded basis. The criteria set out in the amended paragraph (e) are gleaned from the statutory checklist found in section 1(3) of the Children Act 1989 (UK).

Section 13's principles, while placing an emphasis on maintaining the child within the family/whanau, do not adequately address family/whanau problems and their ability to meet the child or young persons needs. Paterson and Harvey noted concern by some agencies that family/whanau problems were not always adequately addressed at family group conferences. The result being that a child or young person can return to a situation which has not changed and which had contributed to their coming to the attention of the DSW in the first place.144 The proposed amendments to section 13 purport to redress this problem.

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144 Above n 114, 15.

V REPORTING OF CHILD ABUSE

A *Recommended Legislative Amendment*

15. Definition of child abuse - For the purposes of this section, the term 'abused' means harmed (whether physically, emotionally, or sexually), ill-treated, abused, neglected or deprived.

(1) Reporting of child abuse - Any person who believes that any child or young person has been, or is likely to be, abused may report the matter to a Social Worker or a member of the Police.

(2) Mandatory reporting of child abuse - Notwithstanding any enactment or rule of law, any person who, in the course of carrying out their duties as -

(a) A registered medical practitioner:
(b) A person registered or enrolled as a nurse under the Nurses Act 1977:
(c) A school dental nurse:
(d) An early childhood teacher employed in an early childhood centre within the meaning of section 308 of the Education Act 1989.
(e) A teacher employed in a registered school within the meaning of section 2(I) of the Education Act 1989:
(f) A person employed to provide home-based care in accordance with the Education (Home-Based Care) Order 1992 or who is a care arranger within the meaning of section 308 of the Education Act 1989 or who is employed by a care arranger to arrange home-based care:

has reasonable grounds for believing that any child or young person has been abused, shall promptly report the matter to a Social Worker, or a member of the Police.

(3) Notwithstanding any enactment or rule of law, any Social Worker or member of the Police, who has reasonable grounds for believing that any child or young person has been, or is likely to be, abused shall promptly report the matter to another Social Worker or member of the Police.

(4) A person who knowingly fails to comply with subsection (2) or subsection (3) of this section is guilty of an offence.

B *Comment*

The Mason Team in its review of the children, Young Persons and Their Families Act 1989, recommended that mandatory reporting be imported into the statute for a designated list of professionals.145 The Mason Report was critical of continued opposition by the DSW to mandatory reporting:146

> We are left with the impression that the Departmental view is more concerned with 'scarce resources' and the increased workload which may result from mandatory reporting rather than the need to detect and respond to allegations of abuse. We must record that the DSW stance finds no support from the submissions received by us. We believe that scarcity of resources is an unacceptable reason for rejecting the concept of mandatory reporting. If the need is serious enough, resources must follow. The need is serious.

The Mason Team recommended that any designated persons who, in the course of carrying out their professional duties, have reasonable grounds for believing that any child or young person has been or is likely to be harmed (whether physically, emotionally or sexually), ill-treated, abused, neglected, or deprived shall report the matter to the DSW.

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145 Above n 11, 18.

146 Above n 11, 13.

Despite the absence of mandatory reporting, and increased willingness to report child abuse has been evident in recent years. In 1988, 10,663 cases were reported, compared with 24,861 in the year to 30 June 1992 and 28,756 notifications in the year ended 30 June 1993.147

Discretionary reporting with an emphasis on education has proved effective in improving reporting practices. The Mason Team believes that statistics showing increasing levels of reported abuse is matched by a growing concern for children's rights and the need to protect children.148 The Mason Team put the case for mandatory reporting in the following terms:149

> However, unpalatable as it may be, the simple fact of the matter is that abuse of children in its various forms has reached a totally unacceptable level, to the extent that there is need for a policy which spells out that the community will no longer tolerate that state of affairs.

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147 Department of Social Welfare *Statistical Information Report* (Fiscal, 1993) 70.

148 Above n 11, 15.

149 Above n 11, 16

Despite further opposition by the DSW's social policy agency,150 the new section 15B contained in clause 4 of the 1993 Amendment Bill provides for the mandatory reporting of child abuse by designated professionals. Clause 4 controversially extends the list of designated reporters advocated by the Mason Report. Clause 4 also raises the threshold level of compulsory reporting recommended by the Mason Team from reasonable grounds for believing that any child has been or is likely to be harmed to reasonable grounds for believing that any child has been, or is likely to be, abused in a manner that has caused, or is likely to cause, serious harm to that child.

1. *New Zealand Bill of Rights Act 1990*

An argument raised against the introduction of mandatory reporting, which did not confront its provision in the 1986 Bill, is that it is in breach of the New Zealand Bill of Rights Act 1990. The Hon D Graham, MP, on behalf of the Attorney-General,151 stated at the introduction of the Amendment Bill in Parliament that the new section 15B in clause 4 of the Bill appears to breach section 14 of the New Zealand Bill of Rights Act 1990. Section 14 provides that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information of any kind in any form.

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150 See "Advice on law change 'ignored'" *The Evening Post*, Wellington, New Zealand, 31 July 1992.

151 Section 7 of the New Zealand Bill of Rights Act 1990 requires the Attorney-General to report to Parliament where any Bill appears to be inconsistent with the Bill of Rights.

The Minister stated that compelling people to report suspected child abuse cases is in breach of freedom of expression guarantees, which included the right not to be required to say anything.152 The Minister stated:153

> The Attorney-General is satisfied that the reporting of a belief that a child has been, or is likely to be, abused is a requirement to express one self, and for that reason amounts to a prima facie breach of section 14 of the New Zealand Bill of Rights Act.

The Minister then considered it necessary to consider whether the proposed mandatory reporting regime can be justified as a reasonable limit on freedom of expression within the meaning of section 5 of the New Zealand Bill of Rights Act. Section 5 states that the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Thus, freedom of expression can in some circumstances be restricted in the greater public interest. The Hon D Graham, MP, conceded that:154

> ...,a strong argument can be made that the public interest and the objectives behind new section 15B - namely, increasing awareness, reporting, and detection of abuse of children, and giving symbolic expression to the seriousness with which the State treats child abuse, as a means of protecting children - outweigh the right of certain people to freedom of expression.

The Attorney-General was however drawn to the conclusion that:155

> ...,the available evidence shows that, even with the intrusion into freedom of expression, the provision as drafted does not appear to achieve the most important objectives of a mandatory reporting regime - that is, the increased detection and prevention of child abuse.

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152 NZPD, No 85, 17314, 10 August 1993.

153 Above n 152.

154 NZPD, No 85, 17315, 10 August 1993.

155 Above n 154.

The Attorney-General concluded that the new section 15B in clause 4 of the Bill appears to breach section 14 of the Bill of Rights Act and cannot be justified under section 5 of that Act as a reasonable limit in a free and democratic society. Significantly, the Hon D Graham, MP, acknowledged that the issues are "very finely balanced" and that evidence presented to the select committee may go some way towards establishing that all of the objectives of a mandatory reporting regime could be met.

The application of section 5 of the Bill of Rights Act in Parliament is interesting. The Court of Appeal has indicated that the Attorney-General is likely to be concerned with section 5 in performing his/her function under section 7 of the Bill of Rights Act.156 Whether Parliament intended section 5 to be utilised in this way is unclear. While it is important and valuable for Parliament to consider the merits of a mandatory reporting regime, to do so in the context of section 5 is curious. Technically at least, limits in terms of section 5 can only be justified when "prescribed by law".157 The inference exists that section 5 was not intended to be used to vet prospective legislation. Since clause 4 of the Amendment Bill is not "prescribed by law," consideration of whether its limits are reasonable is irrelevant.

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156 *Ministry of Transport v Noort, Police v Curran* (1992) 3 NZLR 260, 271

157 See s 5 of the New Zealand Bill of Rights Act 1990.

Even if enquiry into reasonableness is relevant in the context of section 5 it is important to keep in mind that, unlike the Canadian Charter of Rights and Freedoms, upon which the New Zealand Bill of Rights Act is based, the Bill of Rights Act is an ordinary statute. Non-compliance with sections 5 or 14 can not fetter Parliament from enacting legislation inconsistent with the Bill of Rights. "The rights and freedoms in Part II are not constitutionally entrenched and may be overridden by an ordinary enactment,.."158

It must be readily accepted that a mandatory reporting provision is inconsistent with section 14 of the New Zealand Bill of Rights Act. However, if enacted and therefore necessarily "prescribed by law," mandatory reporting under a new section 15B will prevail over the Bill of Rights. Section 5, by virtue of section 4 of the Bill of Rights Act would be rendered inapplicable. It has been stated by the Court of Appeal that:159

> Section 4 of the New Zealand Bill of Rights Act lays down the basic rule, never to be lost sight of, that inconsistent enactments are to prevail over any provision of the Bill of Rights Act as far as the Courts are concerned...
> Section 5, as to justifiable limitations on the rights and freedoms contained in the Bill of Rights Act, is subject to s4. So, if an enactment is inconsistent with any provision of the Bill of Rights Act, that enactment prevails and the Courts are not concerned with s5.

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158 Above n 156, 276.

159 Above n 156.

Paul Rishworth consolidates the Court of Appeal's comments by maintaining that even if "the statutory limits are unreasonable the statute must apply none the less because an inconsistent statute prevails over the Bill of Rights (s4)".160 From a legal perspective inconsistency between a mandatory reporting regime and the Bill of Rights would not be problematical. Once enacted and therefore "prescribed by law" section 5 analysis is "immediately truncated". Section 5 aside, consideration of the substantive merits or otherwise of a mandatory reporting regime is apt. Comments by American researcher and author Deboraha Daro provide a useful starting point. Daro states:161

> The scope of future child abuse reporting laws will be shaped by realities of what a child welfare system can accomplish and the extent to which practitioners and policy makers are comfortable erring on the side of either protecting family privacy or protecting children.

2. *Disadvantages of mandatory reporting*

One of the strongest arguments against the mandatory reporting of child abuse is that it leads to a dramatic increase in the number of unsubstantiated reports and a resulting inefficient allocation of resources. Tessa Gibbons, in an essay appended to the Mason Report, states:162

> Mandatory reporting leads to a dramatic rise in the number of child abuse reports, many of which are not substantiated. Inevitably as there is an increase in the number of reports, the work load of those investigating them also increases. But as it has been established that many are not substantiated, much of this work is a complete waste of time. This time could be better used helping those children in need.

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160 P Rishworth "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" (1991) NZ Recent Law Review 337, 342.

161 D Daro *Confronting Child Abuse: Research for Effective Program Design* (Free Press, New York, 1988)201.

162 Above n 11, 205. Appendix 2, T Gibbons "Criminal Justice Essay" *Mandatory Reporting of Child Abuse. Is it a better option than Voluntary Reporting, and if so, what form should it take? at 208. Gibbons provides an excellent discussion on mandatory reporting.*

Urgent cases could become "lost in the mire". A higher incidence of unsubstantiated reports would lead to a corresponding increase of intrusion into families lives. The DSW scarcity of resources argument mentioned above by the Mason Report is a problem of very real proportions. The DSW anticipates the introduction of compulsory reporting will necessitate employing more social workers, the vast majority of whom would be unqualified. The Mason Report raised concerns over the current standard of social workers and the procedures adhered to within DSW in dealing with child care and protection cases

Efficient and effective response to reports of child abuse is imperative. This requires an adequate number of competent and qualified social workers. Designated reporters will also need training on what and how to report. The development of a feedback system is also important. Reporters need specific feedback as to results of their actions. Feedback as to why a case was or was not substantiated may help the reporter in the future. Any introduction of mandatory reporting would therefore need to be preceded by comprehensive training and resource improvisation. Mandatory reporting without a corresponding injection of resources will be counter-productive to the interests of children. The cost of a mandatory reporting regime will be considerable.

The Hon D Graham, MP has stated:163

> because mandatory reporting increases the rate of reporting of unsubstantiated cases, there is considerable doubt whether mandatory reporting leads to the identification of more actual victims of abuse. There is no evidence that mandatory reporting, by itself, will promote effective intervention in cases of abuse, or prevent further abuse or injury.

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163 Above n 154.

The Minister's comment that mandatory reporting cannot by itself promote effective intervention or prevent further abuse is apt. Mandatory reporting highlights its targeted problem, it can not be expected to single-handedly resolve it. The basis for claims that compulsory reporting will not lead to the identification of more actual victims of abuse are also unclear. Daro suggests that in the United States the percentage of substantiated cases is highest among professionals required by law to report.164

A less convincing argument against mandatory reporting is that child abusers may be discouraged from seeking help for the abused child, or even sending the child to school for fear that the abuse will be reported.165 Therapists at Lower Hutt's Anglican Social Services Family Centre, for example, fear that compulsory reporting could force child sexual and physical abuse problems underground.166 Gibbons acknowledges several flaws in this argument. Firstly, it is not substantiated statistically. The number of parents prepared to risk the life or medical well being of their child by not seeking advice is likely to be small. Further, such a problem will still be prevalent in the present voluntary reporting regime. Gibbons raises the converse possibility:167

> ...that some parents may be relieved to have their abuse of their child out in the open - it may force them to face up to the offence of child abuse which can easily be denied within a family context.

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164 Above n 161, 24. Daro states reports coming from professionals, particularly medical staff and police have the highest rate of substantiation in the United States.

165 Above n 162.

166 Above n 150.

167 Above n 162, 209.

3. *Advantages of mandatory reporting*

By requiring mandatory reporting, society is making a strong philosophical point - that child abuse is not a private matter for the family. The Mason Team stated:168

> We believe that philosophically the community would not only be registering its abhorrence of child abuse but would also be registering a powerful statement in support of children if it were to adopt the principle of mandatory reporting.

Mandatory reporting emphasises the law's commitment to the protection of children and recognises that the community cares about child abuse, and regards it as a serious issue. "The obligation to bring to attention episodes of child abuse is an affirmation of the fact that we, as a society, do not accept that the abuse of a child is a private matter for the family."169

Recognition is given to children as individuals in their own right. Mandatory reporting is more than symbolic. The law is, in effect, acknowledging that the safety of the child is paramount when abuse is suspected.

The person with a discretion to report faces a number of dilemmas when confronted with signs of child abuse. Problems in identifying abuse give rise to the suspicion versus certainty dilemma, which can manifest itself in a reluctance to report because of a fear of being wrong. Mandatory reporting does not necessarily alleviate this dilemma but it is a mechanism by which people with more expertise in assessing and dealing with possible cases of abuse can be involved. A compulsory notification provision will "absolve doctors and other professionals of sole responsibility for taking appropriate action regarding a case of abuse".170

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168 Above n 11, 16.

169 Above n 162, 212.

170 Above n 162, 214.

To some extent compulsory reporting removes the onus on professionals to make a value judgement and the temptation to deal with the matter themselves. Mandatory reporting avoids selective reporting by designated reporters. Such professionals, under a voluntary reporting regime, are more likely to discriminate on a socio-economic basis when deciding whether to report. Manatory reporting avoids the risk of operating a two-tiered child welfare system, "one which poor children are systematically treated differently than most affluent children" 171
"A practical benefit of Mandatory Reporting Laws is that such a provision removes any element of choice."172

To some extent the power of abusers is also reduced. Mandatory reporting helps protect the reporter from pressures exerted by community or family groups who may seek to influence his/her decision to report.

A compulsory notification regime will facilitate early referral to experts. The temptation to question a child excessively or repeatedly to substantiate abuse before reporting will be stressful for a child and could reduce the quality of information given to experts later on.173 Mandatory reporting coupled with the necessary training of designated reporters will hopefully avoid this. However it is conceivable that a potential reporter, wary of the legal onus to report, may be more inclined to question a child excessively.

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171 Above n 161, 22.

172 Above n 162, 213.

173 Ministry of Education "Prevent Child Abuse - Guidelines for Early Childhood Education Services" (Wellington) 19.

A second dilemma facing reporters involves confidentiality. The most common example given is that of a teacher who is told in confidence by a girl that her father is sexually abusing her. A legal obligation to report the abuse alleviates the teacher's dilemma:174

> Mandatory Reporting means that in these situations the child and teacher are protected. The teacher is relieved of the major ethical dilemma of whether or not to tell and the child receives expert advice as well as relief from abuse.

The mandatory requirement to report can also alleviate tension between the reporter and the child's family. A teacher for example, fearful of repercussions, can point to his/her legal obligation to report. The need to maintain a working relationship between a teacher and parents will be enhanced if parents see the reporter as protecting him/herself from liability.

While the number of unsubstantiated cases of reported abuse increases with mandatory reporting, so too will the number of substantiated cases. The publicity surrounding the enactment of a compulsory notification provision will also facilitate public awareness of the problem of child abuse.175

4. *Conclusion of advantages and disadvantages of mandatory reporting*

The proposed amendment of section 15 of the 1989 Act above reflects the writers preference for a mandatory reporting provision for designated professionals. As the Hon D Graham, MP, has stated in Parliament, the issues concerning mandatory reporting are "very finely balanced".176

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174 Above n 162, 211.

175 The Department of Social Welfare recognises in its 1993 Annual Report that the increase in the number of notifications of child abuse was affected by the processing of several high profile multiple abuse cases. The publicity surrounding these reports heightened public awareness of the problem of child abuse.

176 Above n 154.

The Minister suggests the new section 15B contained in clause 4 of the Amendment Bill "does not appear to achieve the most important objectives of a mandatory reporting regime - that is the increased detection and prevention of child abuse".177 It is submitted that whether the objectives of mandatory reporting can be attained will rest significantly on how realistically we set those objectives. The basis for the Minister's claim that there is doubt mandatory reporting will lead to "the identification of more actual victims of abuse" is unclear. Contrary to the Minister's expectations, mandatory reporting cannot realistically be expected, "by itself", to promote effective intervention in cases of abuse. Effective intervention is as much to do with the provision of quality service by the DSW and the commitment of the family group to ensure the child's protection.

Mandatory reporting accords recognition that the interests of children should be paramount. Gibbons aptly states: "Children deserve the strongest laws possible to protect them".178 It is now necessary to consider the issues involved in formulating a mandatory reporting provision.

5. *What should be reported?*

The writer's proposed amendment requires professionals listed in subsection (2) to report abuse which they believe on reasonable grounds has occurred. Social Workers and members of the Police are required under subsection (3) to report abuse which they believe on reasonable grounds has, or is likely to occur.

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177 Above n 154.

178 Above n 162, 215.

The threshold of abuse is defined in subsection (1). Compulsory notification of harm as defined in subsection (1) is in line with the Mason Team's recommendation. Section 15(B) contained in clause 4 of the Amendment Bill currently before Parliament requires all designated reporters to report abuse which they believe on reasonable arounds has, or is likely to occur. Significantly the threshold of abuse is high, limited to abuse "that has caused, or is likely to cause, serious harm" to a child or young person.

It is submitted that an objective standard, requiring reasonable grounds, is desirable. Designated professionals listed in subsections (2) and (3) above can be expected to possess some expertise in identifying abuse and therefore requiring reasonable grounds is sensible. An objective standard would also temper the expected rise in unsubstantiated reports. Further the enforcement provision in section 15(4) above would be almost unworkable if a subjective criterion were set.

The differentiation in the writer's proposed amendment, between the professionals listed in subsection (2) and social workers and members of the Police in subsection (3) should be noted. Requiring the former group to only report harm which has occurred reduces the likelihood of speculative reporting by those reporters listed in subsection (2). Social workers and members of the Police deal frequently with cases of child abuse and should be expected to possess particular expertise in identifying harm which is likely to occur. They will usually have access to more information from the investigative process and therefore be more able to assess the risk of future harm to a child or young person.

Requiring designated reporters to report abuse or harm as defined in section 15 above will, it is accepted, yield a higher number of unsubstantiated reports and will necessitate increased incidence of intervention into family privacy. Conversely by requiring reporters to only report abuse that has caused, or is likely to cause, serious harm we accept that children who suffer less than serious injury may never come to notice. Once again it comes down to whether the law is prepared to err on the side of protecting children or respecting family privacy. For reasons already mentioned in this paper, with regard to the discussion of section 13 in Part IV, it is submitted that the threshold of "serious harm" is too high. Again the legislature's tendency to show loyalty to family privacy comprises the best interests of children. The "serious harm" criteria is rigid and rules out a whole range of conduct which is deleterious to children. Further, the Amendment Bill fails to define what amounts to serious harm.

6. *Who should be required to report?*

The designated person's required to report in the writers proposed amendment are generally in line with those advocated by the Mason Team.179 Requiring all citizens to report has been strongly resisted. The designated persons are seen to have ready access to children and some expertise in identifying child abuse. An important corollary to mandatory reporting is recognition that persons required to report receive extensive education.

Significantly, the 1993 Amendment Bill casts the net of designated reporters much wider than recommended by the Mason Report. Membership of the

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179 Above n 11, 192.

designated group in the new section 15B, contained in clause 4 of the Bill, is not without its controversy. Reporting would be mandatory for members of the Police, DSW social workers, medical professionals such as doctors, registered nurses, school dental nurses, and registered psychologists, teaching professionals, including child-care workers, probation officers, people working in approved alternative care services, and barristers and solicitors.

The Privacy Commissioner, Mr Bruce Slane, has recommended mandatory reporting should not be introduced principally on the ground that it "could fundamentally alter the nature of a number of confidential relationships thereby limiting the persons to whom a person being abused, or indeed an abuser, might turn for assistance".180 The Mason Team acknowledged "that there is a need to carefully balance the wellbeing of the child against the understandable wish of some professional people to maintain confidentiality and the trust of their patients/clients."181

Nevertheless the Mason Team suggests that mandatory reporting would be helpful to teachers, health professionals and other groups in a professional sense182 and that such groups support mandatory reporting as "registering a powerful statement in support of children".183

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180 In an eight-page statement released on 18 August 1993. See "Abandon abuse reporting plan, urges commissioner "*The Evening Post*, Wellington, New Zealand, 20 August 1993, 2.

181 Above n 149.

182 Above n 149.

183 Above n 149.

Notwithstanding the Mason Team's comments, support for the proposed mandatory reporting regime among designated professionals is divided. Opposing views within professions highlight the dilemmas professionals face on the issue of mandatory reporting. A doctor's group, Doctors for Sexual Abuse Care, strongly supports mandatory reporting but the College of Nurses does not.184 Doctors for Sexual Abuse Care believe mandatory reporting demonstrates the value society places on its children and would also make it easier for doctors to report a case.185

However, College of Nurses president Jenny Carryer is reported to have expressed fear that mandatory reporting would destroy the trusting environment required before help was sought and therefore increase the amount of hidden abuse.186

The Post-Primary Teachers Association ("PPTA") voted in August 1993 against mandatory reporting. The PPTA is reported to have previously supported mandatory reporting for teachers since 1985.187 In contrast, Te Huarahi, the Maori section of the secondary teachers union, did not support the remit opposing mandatory reporting of child abuse.188 A Maori delegate at the Post-Primary Teachers Association annual conference is reported to have stated child abuse was "rampant but closeted" in Maori families.189

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184 Above n 180.

185 Above n 180.

186 Above n 180.

187 See "Teachers reverse position on reporting child abuse "*The Evening Post*, Wellington, New Zealand, 26 August 1993,3.

188 See "Child abuse closeted, says Maori delgate" *The Dominion*, Wellington, New Zealand, 26 August 1993.

189 Above n 188.

(a) *Doctors*

Concerns expressed by the Privacy Commissioner, Mr Bruce Slane, with regard to the effect of mandatory reporting upon confidential relationships are particularly relevant to doctors and lawyers. Mr Slane suggests that compulsory notification of abuse would make a significant inroad into the Privacy Act 1993 principle190 that an agency which held information obtained for one purpose should not use that information for any other purpose.191 The importance the legislature attaches to medical confidentiality in New Zealand is also found in sections 32 and 33 of the Evidence Amendment Act (No. 2) 1980. These provisions afford statutory privilege to any "protected communication" made by a patient to a registered medical practitioner. A "protected communication" is defined in section 32(3). Significantly it is restricted to information the patient tells the doctor, and does not encompass information which the doctor discovers from a physical examination.192

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190 Principle 10 of the Privacy Act 1993. Note that the Privacy Act principles apply to "agencies" who hold personal information. Also note that there is no absolute ban on the availability of personal information to third parties. Privacy is not an absolute right. Withholding information can be outweighed by considerations which make it desirable in the public interest that the information be made available. For example, to enforce the law; and disclosure necessary to prevent or lessen a serious imminent threat to the life or health of the individual concerned or another individual.

191 Above n 180.

192 *Pallin v Department of Social Welfare* [1983] NZLR 266,271.

Professional privilege will rarely attach to a doctor reporting child abuse.193 It is the child who is the patient, not the parent. Further "protected communication" as defined in section 32(3) will not extend to what a doctor may observe in the course of an examination. The introduction of mandatory reporting will nevertheless provide a clear case for disclosure without patient consent in rare situations where privilege would apply between doctor and patient. It is submitted that the importance to society of maintaining the confidential relationship between doctor's and patients, in these rare situations, is outweighed by the importance of protecting children.

(b) *Lawyers*

The inclusion of barristers and solicitors in clause 4 of the Amendment Bill is surprising. Inclusion of lawyers in the 1986 Bill was strongly objected to by the Law Society in its submissions to the Select Committee at that time.194 In the light of the fact that the Mason Team did not propose barristers and solicitors be required to report, one wonders what motive the Minister of Social Welfare, the Hon J Shipley, MP, has for their inclusion.

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193 Above n 174.

194 See "Children Young Persons and Their Families Act" *LawTalk*, Newsletter of the New Zealand Law Society, 3 May 1993,1.

Mc Gechan describes the lawyer-client privilege in the following terms:195

> A client cannot be compelled and a legal advisor will not be allowed, either during or after the termination of his employment as a legal advisor, without his client's consent, to disclose oral or documentary communications:
>
> (a) Between the client (or his agent) and the client's professional legal advisers.
> (b) Between the client's professional legal advisers and third parties if made for the purpose of pending or contemplated litigation.
> (c) Between the client or his agent and third parties, if made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation.

Significantly subclause (4) of clause 4 exempts a barrister or solicitor from reporting a belief held on reasonable grounds that a child has been, or is likely to be abused, where that belief arises by reason of that barrister or solicitor acting in a professional capacity for any person who is -

> "(a) Charged with an offence against the child or young person; or
> (b) A party to any application under -
> (i) This Part of this Act; or
> (ii) The Guardianship Act 1968; or
> (iii) The Guardianship Amendment Act 1991."

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195 R A McGechan *Principles of the Law of Evidence* (7 ed, Butterworths, Wellington, 1984) 263.

Therefore clause 4 abrogates the lawyer - client privilege in child abuse cases but exempts from reporting requirements statements made to a barrister or solicitor in confidence for the purposes of obtaining legal advice by someone who is or who may become the criminally accused or is a party to any application under subclause 4(b). Clause 4 attempts to balance the competing interests involved in the privilege with a social policy to protect children and combat child abuse. The potential scope for lawyers having to breach client confidences is reduced considerably by subclause 4(b) of clause 4.

Twenty-two states in the United States have mandatory reporting systems applicable to lawyers.196 Of those, eighteen have statutes that include lawyers generally through language that, for example, imposes the duty on "any person". Only four states have statutes that specifically mention lawyers as a group subject to mandatory reporting. Robert Mosteller warns:197

> ...legislatures should avoid too quickly deciding that lawyers, because they may be propitiously situated, should be required... to report what they know and what they suspect about their clients.

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196 R P Mosteller "Child Abuse reporting laws and attorney-client confidences" (1992) 42 Duke Law Journal 203, 217.

197 Above n 196, 277.

The protection of children from abuse would be rendered only the most minor aid by the inclusion of lawyers under a mandatory reporting regime. Lawyers are not on the frontline in dealing with children and "are rarely the first to learn of abuse".198 The "net loss of information occasioned by the privilege is relatively minimal as it is the privilege's very promise of confidentiality that encourages the initial candid and damaging revelation".199

In contrast to the doctor/patient privilege, disclosure of abuse in the lawyer/client privilege will often come from a parent rather than a child and will most likely be "communicated". Notwithstanding the qualification contained in subclause (4) of clause 4, the potential for compromising professional neutrality is greater. As acknowledged by the New Zealand Law Society, removal of legal privilege is unlikely to result in any increase of reports.200 It is submitted that the inclusion of barristers and solicitors in clause 4 of the proposed amendment to the 1989 Act is not desirable.

(c) *Psychologists and Probation Officers*

It is submitted that registered psychologists (subclause 1(f) of clause 4) should not be subject to a mandatory reporting provision.

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198 Above n 197.

199 Above n 197.

200 Above n 194.

Communications to a registered psychologist are protected under sections 32 and 33 of the Evidence Amendment Act (No 2) 1980. As with lawyers, disclosure of abuse to a psychologist is likely to be communicated. Many psychologists, as with probation officers (subclause j of clause 4), do not have the day to day access to children that characterises professions such as teaching or nursing. Neither group it is submitted, should at this stage be included under a mandatory reporting regime.

(d) *Early Childhood Centre Employees*

It is submitted the group listed in subclause 1(g) of clause 4 that is "Any person employed to care for children in an early childhood centre..." is too wide. This group should be limited to qualified staff working in an early childhood centre. Most child care centres for example will have a ratio of qualified to unqualified staff. Some unqualified staff will be undertaking field based training towards an early childhood qualification. Bearing in mind that people required to report are expected to have some expertise in identifying child abuse, it is submitted compulsory notification should be limited to qualified employees in an early childhood centre.

(e) *Home-based care / "care-arrangers"*

The inclusion of people employed in home-based care and "care arrangers" within the meaning of section 308 of the Education Act 1989 in subclause 1(h) of clause 4 is supported. Again these people will have daily access to children and would possess some expertise in identifying child abuse. Their inclusion provides safeguards for children who are educated or cared for in their own homes and who would not have exposure to other professionals such as teachers in an early childhood centre.

(f) *Social Services*

Subclause 1(k) of clause 4 includes people employed in any Child and Family Support Service, Iwi Social Service / Cultural Social Service, or Community Service, or in any home registered under the Disabled Persons Community Welfare Act 1975, as mandatory reporters. It is submitted these groups should continue to be subject to a voluntary reporting regime. People employed by these groups will include counsellor's dealing themselves with cases of abuse. Often the purpose of a mandatory, reporting provision - to identify abuse and provide resources for its treatment, will be adequately dealt with by the agencies listed in subclause (1) (k) without the need to report the matter to DSW.

> A mandatory reporting regime may compromise the relationship between counsellors and their clients unnecessarily. Further, health professionals such as doctors and nurses will often work alongside the groups listed in subclause 1(k) and will therefore have access to the people they deal with. Thus, any need for a mandatory reporting provision with regard to people dealt with by the groups listed in subclause 1(k) will already be catered for.

7. *Enforcement*

Both Gibbons and the Mason Team advocate a sanction for failure to report abuse which reflects the serious nature of the obligation. While the precise nature of this sanction is left for Parliament to determine, it seems that a criminal sanction is preferred:201

> Thus it appears that a parallel criminal sanction would be both a symbol of the seriousness with which the crime is viewed and a desire to see the proper observance of the law.

Significantly the new section 15B contained in clause 4 of the Amendment Bill does not include an enforcement provision. The use of criminal sanction to enforce reporting of confidential client information, like mandatory reporting itself, is a contentious issue. "It is a small part of the increasing overall regulation of our society and particularly a growing tendency to use the criminal law in attempting to solve every difficult social problem".202

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201 Above n 162, 219.

202 Above n 196, 276.

In the United States, where mandatory reporting is required in all states, only about half include penalties for not reporting and even fewer have the capacity to enforce these penalties.203 Given the inherent difficulty in identifying child abuse, strict liability seems inappropriate. The inclusion of a mens rea requirement in the writer's proposed amendment above (section 15(4)) is an attempt to bring to criminal account only those designated reporters who clearly flout their legal responsibility.

C *Section 16*

Section 16 affords protection to people reporting ill-treatment or neglect of children or young persons, provided the report is made in good faith. Protection is provided against civil, criminal, and disciplinary proceedings. Clause 5 of the Amendment Bill overcomes a doubt that has arisen regarding the scope of the existing provision. Clause 5 amends section 16 of the 1989 Act by inserting, after the word "supply", the words, "or the manner of the disclosure or supply". The amendment is necessary because of a High Court decision in *McArthur v Medical Council of New Zealand (No 2)*.204 Greig J held that section 16 did not protect a person from professional disciplinary action where, in reporting suspected child abuse, the person does not comply with the procedural requirements of the professional body concerned. In *McArthur* the appellant had a duty to inform colleagues of his belief that a crime had been committed, before reporting that belief to the police.

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203 Above n 161, 19.

204 *McArthur v Medical Council of New Zealand (No 2)* Unreported, 11 October 1990, High Court, Wellington Registry, M239/87.

Greig J considered the purpose of section 16 was not to protect people from punishment if they failed to disclose the matter complained of to other people where their code of professional conduct requires it.

It is submitted, in support of the proposed clause 5, that it is necessary to remedy the discrepancy created by the decision in *McArthur* by including within the scope of protection the manner in which the report of child abuse was made.

In the United States the norm is to grant immunity from civil and criminal liability to persons reporting situations which they believe place a child at risk of injury. It is almost impossible to sue if the reporter acts in good faith. Section 16 goes a step further by incorporating the standard of good faith. The use of an objective criteria in section 15, requiring reasonable belief, will enhance the need for section 16.

Daro suggests a negative aspect of comprehensive protection of reporters in the United States may be to encourage reporting of situations that represent questionable parental practices rather than actual or potential ill-treatment or neglect.205

Section 16 does not deal with civil liability for failures to report. It has been suggested that in the United States, the risk of law suits may be encouraging professionals to report remote risk situations.206 The writer does not anticipate this problem in New Zealand. Limiting reporting in section 15(2) of the writer's proposed amendment above, to harm which has occurred avoids the professionals required to report having to assess remote risk situations.

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205 Above n 161, 20.

206 Above n 203.

VI THE POST REPORTING PHASE

A *Recommended Legislative Amendment*

17. Investigation of report of ill-treatment or neglect of child or young person - (1) Where any Social Worker or member of the Police receives a report pursuant to section 15 of this Act relating to a child or young person, that Social Worker or member of the Police shall, as soon as practicable after receiving the report -

(i) Inform a Care and Protection Resource Panel; and

(ii) In consultation with a Care and Protection Resource Panel, undertake or arrange for the undertaking of such investigation as may be necessary or desirable into the matters contained in the report.

Sections 17(2), 18(1) and (2) - for the purposes of these subsections any reference to "Social Worker" shall be amended by inserting, after the word "Social Worker," the words, "with the agreement of a Care and Protection Resource Panel".

B *Comment*

The Mason Review highlighted several problem areas in the post reporting process under the 1989 Act. Mandatory reporting, or indeed reporting per se merely highlights its targeted problem. It is submitted mandatory reporting must be complemented by co-ordinated input from people with expertise. Adherence by some social workers to the minimal intervention and family autonomy principles at the investigative and referral stage can dangerously compromise an adequate range of community and professional perspectives being considered in the post reporting phase.

Section 17 deals with the investigation of reports of child abuse. Subsection (1) places a statutory duty on social workers and members of the Police to consult with a Care and Protection Resource Panel after receiving a notification. Section 17(2) and section 15(1) provide that where any social worker or member of the Police believes that a child or young person is in need of care or protection, that social worker or member of the Police shall report the matter to a Care and Protection Co-ordinator, who shall convene a family group conference.

There are three principal areas of concern with regard to social work practice under sections 17 and 18. First, the statutory duty of social workers to consult with Care and Protection Resource Panels is not always adhered to. In 1990 the Commissioner for Children found that the percentage of notifications referred for consultation was 61 per cent in the first half of the year, and only 57 per cent in the second half.207 Non-compliance with section 17(1) continues to be a major problem. The discrepancy between the total number of notifications and the number of consultations by social workers with Care and Protection Resource Panels in the past two years is cause for alarm. In 1992, of 24,243 notifications208 only 9,529 consultations took place.209

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207 Above n 74.

208 Above n 147; the total number of notifications was 24,861 in 1992 and 28,756 in 1993. This number includes CP13 notifications (Parent or caregiver respite) and CP01 -CPO5 notifications (these are the reports that a child has been or is likely to be harmed, ill-treated, abused, neglected or deprived). The social workers statutory duty to consult Resource Panels relates only to CP01 - CP05 notifications.

209 Above n 147.

In 1993, for the year ended June, only 14,542 consultantions resulted from 27,950 notifications of child abuse.210 The DSW itself acknowledges that the "variance is due to some non-compliance by social workers and in part to recording practices".211

The second problem relates to the high threshold being set in the number of cases referred on to the Care and Protection Co-ordinators. Some cases never receive the attention they require. The Mason Team stated:212

> In one regional office we noted that 190 complaints of alleged sexual abuse had been recorded during a specified period. Of those 190 cases, only 2 were referred to the Co-ordinator.

From a sample of 30 files the Mason Team found that 30 per cent of the cases not referred to a Co-ordinator disclosed a likelihood of the need for care or protection. The Mason Report concluded:213

> The irresistable conclusion that we draw is that some social workers do not know what is meant by the term "care or protection" or that they are using the "minimum intervention" principle as justification for subverting the principles of the Act.

The third and related concern is the number of "informal meetings" conducted by social workers as opposed to passing cases on to FGCS.214.

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210 Above n 147.

211 Above n 147, where a sibling group is the subject of a notification, the notification is entered for each child while the Panel consultation is in some cases recorded as only one consultation.

212 Above n 11, 41.

213 Above n 11, 43.

214 Above n 212.

> We have been told that in several regions family or whanau meetings have been held instead of FGCs. One commentator has suggested that the DSW is side-stepping the legal process and in a more cynical vein has suggested that this is aimed at avoiding the cost of funding the FGCs.

The Mason Team attributed part of the problem over Family/Whanau meetings and/or agreements215 to the DSW's circular memorandum 1991/172 which states:

> Family/whanau agreements can be established for those family/whanau whose children and young people may fall within the scope of section 14 of the Children, Young Person [s] and Their Families Act 1989.

The use of family/whanau agreements as an alternative to family group conferences in respect of cases falling within the ambit of section 14 directly breaches section 18.

Paterson and Harvey216 suggest that informal meetings are favoured by many social work teams rather than FGCs because they are less intrusive. The weight attributed to the minimal intervention principle again may dangerously tip the scales in favour of family autonomy. Informality will often not be in the interests of children who are in need of care or protection. Informal meetings tend to be characterised in terms of fewer participants and the venue is likely to be the home of the family.216a Existing power inequality within the family is likely to override the child's interest.

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215 A Family/Whanau Agreement is a voluntary contract between the child's Family/Whanau and the NZCYP Service for the provision of services to meet the care of protection needs of a child or young person. The agreement is entered for a three month period and is renewable.

216 Above n 144.

216a FGCs are held at neutral venue's where all Family members feel comfortable. This may be a NZCYPS office if appropriate or a marae.

Holding informal meetings when the "in need of care or protection" criteria is met is a case of policy overriding the law. The Mason Team agreed with the Commissioner for Children that:217

> ...if a meeting with the family is required to resolve issues about care and protection, a Family Group Conference should be convened by those people employed and qualified to do so.

Requiring the agreement of a Care and Protection Resource Panel under the writer's proposed amendments to sections 17(2), 18(1) and (2) puts the social workers duty to consult in even stronger language. Consultation will be imperative for future action. It also enables Resource Panels to monitor the screening of social worker's definition of "in need of care or protection". Resource Panels can provide an independent perspective, their agreement providing a "safety net", bearing in mind the number of unqualified social workers employed by the DSW. Comprehensive training may mean this requirement could be done away with in time. DSW guidelines set a precedent for requiring Resource Panel agreement with regard to the exclusion of persons from FGCs.218

The 1989 Act is clear, if a child is in need of care or protection a FGC should be convened. Legislative change is unnecessary. What is required is adherence to the Act. If informal meetings are going to be set up the enhanced role of Resource Panels will at least ensure there is some community/professional input. The irony is that more involvement by Resource Panels at this point may strengthen the case for some cases to be dealt with otherwise than by a FGC. Resource Panels participation at this stage will hopefully ensure compliance to the duty to convene a conference.

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217 Above n 11, 42.

218 Above n 42, 27.

Significantly clause 6 of the Amendment Bill currently before Parliament amends section 17 of the 1989 Act by repealing subsection (1) and substituting a new subsection (1). The effect of the amendment is to provide that consultation by social workers with Resource Panels can take place during, rather than before the investigation of a suspected case of child abuse. The purpose of this amendment may be to speed up the investigative time frame. Nevertheless it is submitted this amendment will impede quality investigation. Keeping in mind the standard of social worker training and qualifications highlighted by the Mason Report, the input of Resource Panels from the start of an investigation is important. In effect the amendment is a "watering down" of the social workers duty to consult Resource Panels under section 17. It is submitted clause 6 gives effect to a reduction in the role of Care and Protection Resource Panels.

C *Section 19*

1 Recommended legislative amendment

19. **Referral of care or protection cases to Care and Protection Co-ordinator by other persons or by Court-**

(1) Where -

(a) After inquiry, any body or organisation (including a Government department or other agency of the Crown, or a local authority) concerned with the welfare of children and young persons; or

(b) In any proceedings, any Court -

believes that any child or young person is in need of care or protection, that body, organisation, or Court may refer the matter to a Care and Protection Co-ordinator, **together with reasons in writing, for believing that child or young person is in need of care or protection.**

2 *Comment*

Section 19 relates to the referral of care and protection cases to a Care and Protection Co-ordinator by courts and persons other than social workers or members of the Police. The amendment to section 19(1)(b) is an attempt to speed up the investigative time frame between co-ordinators receiving a referral and accepting it. Clause 7 of the Children, Young Persons and Their Families Amendment Bill is cast in similar terms.

D *Section 22*

1 *Recommended legislative amendment*

22. **Persons entitled to attend family group conference -**

(1) Subject to subsection (2) of this section, the following persons are entitled to attend a family group conference convened under this Part of this Act:

(a) [The child or young person]
(b)(i) [A parent or guardian of, or a person having the care of, that child or young person]
(ii)[A member of the family, whanau, or family group of the child or young person].
(c) [The Care and Protection Co-ordinator].
(d) [Where the conference has been convened on the basis of a report under section 18(1) of this Act, a Social Worker or member of the Police].
(e) Where the conference has been convened on the basis of a referral of a matter under section 19(1)(a) of this Act by any body or organisation, a representative of that body or organisation:
(f) [Where the conference has been convened or reconvened for the purposes of section 145 of this Act, a representative of the person who has the care of that child or young person].
(g) [Any person appointed as agent for the High Court under section 9 of the Guardianship Act 1968].

(h) Any barrister or solicitor or lay advocate representing the child or young person:

(i) Any person whose attendance at that conference is in accordance with the wishes of the family, whanau, or family group of the child or young person as expressed in section 21 of this Act:

(j) **A member of a Care and Protection Resource Panel.**

(2) No person to whom paragraph (c) to (f) or paragraph (h) or **paragraph (j)** of subsection (1) of this section applies is entitled to be present during any **discussions** held among the members of the family, whanau, or family group of the child or young person in respect of whom the conference is held, unless those members request any such person to be present.

(3) **The family group conference comprises the persons listed in subsection (1) of this section. The decisions, recommendations and plans of the conference must be agreed to by all entitled members.**

23. [Amend subsection (2) of section 23 by deleting the words "including a member of a Care and Protection Resource Panel".]

2 *Comment*

The terminology of section 22, technically at least, gives rise to several ambiguities with regard to defining the membership and functions of the FGC.219 With regard to who has responsibility for decision making, section 22 is unclear. Section 22 differentiates between two groups entitled to attend a FGC. Section 22(1) lists a "wider" group of people who are entitled to attend. Section 22(2) prescribes a more defined family group whose function is to discuss and deliberate amongst themselves.

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219 See generally Tapp et al, above n 15, 182; D Geddis, below n 220.

The essential question is whether a FGC is constituted by the wider or narrower group. The concern of some commentators is that the family group can enjoy a decision making monopoly, depending on the way section 22 is interpreted:220

> If it is the family group who make the decisions and formulate the plans then they are also the only group who determine if abuse has even occurred in the first place.

While it is part of the family/whanau's brief to decide whether a care or protection issue exists, it must be noted that prior investigation and assessment by social workers will have already identified that the child is in need of care or protection. Family/whanau determination that abuse has not occurred is not full and final. The New Zealand Children and Young Persons Service state:221

> The whanau or family group may well disagree that there is a care or protection issue. Such disagreement is not a decision by the family group conference. It is more likely than not that an inability of the whanau or family group to accept that there is a care or protection issue will result in the family group conference not agreeing on an outcome and the matter then being referred to the Family Court.

However the ability of the family group to perform the functions of the FGC, without sufficient input of information and advice, can place the interests of children in a position of vulnerability.222

> Instead of the family being an integral part of the process, they are able to come to decision in isolation without the beneift of the personal input of relevant people.

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220 D Geddis "A critical analysis of the Family Group Conference" (1993) FLB 141.

221 NZCYPS "Critical analysis of FGC: "a response" (1993) FLJ 7; this article was written in response to the paper by D Geddis, Above n 220.

222 Above n 220, 142.

Geddis suggests section 22 could be read so that the wider group are charged with the functions of section 28 and that the family's opportunity to discuss and deliberate under section 22(2) was included as a safeguard for family autonomy.223

> In support of this view is the fact that the interpretation section on Family Group Conferences refers to s.20 which clearly relates to the wider group. On policy grounds it also makes sense to draw this conclusion. Otherwise you have the situation where someone outside the family has alleged that a child has been abused by the family and the latter then determine if the allegation is substantiated.

This statement should be qualified. The family/whanau can disagree that a child has been abused but its determination will not be decisive as to whether the allegation is substantiated. Nevertheless this interpretation does create an anomaly. Section 30 requires the Care and Protection Co-ordinator to seek the agreement of the referring agency to any decision, recommendation, or plan agreed to by a FGC. If the conference is constituted by the wider group, seeking agreement under section 30 would be superfluous. They would be asked to agree to a decision they have been a party to. "Effectively they would have a veto over their own decision".224

Interpreting the decision-making role in favour of the smaller family group is impliedly supported by some of the words of the Act. Section 22(1) only gives the right to "attend", it does not provide the right to "deliberate" which is found in section 22(2). Subsection (2) also makes reference to the "family group conference". This second interpretation avoids the anomaly prescribed by section 30.

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223 Above n 222.

224 P Tapp "Family Group Conferences and the Children, Young Persons and Their Families Act 1989: an ineffective statute?" [1990] NZ Recent Law Review 82, 87.

Co-ordinator practice and policy guidelines reflect the interpretation problems. Clearly DSW regard the wider group as "entitled persons" to constitute the FGC.225 All entitled members of the FGC are "party" to the decisions, recommendations and plans. However the anomaly mentioned above is perpetuated by the guidelines which require "formal agreement" by the referring agency under section 30.

It is submitted "formal agreement" under section 30 affords very little protection to children.

The reality of such agreement is that it operates as a rubber stamp.226 In 1992 only 40 FGC plans, decisions / recommendations from a total of 3,944 plans were not accepted under section 30.227 The number not accepted for the year ended June 1993 was 58 out of a total of 4,999 cases.228 Unfortunately the Department of Social Welfare does not record statistics as to why plans are not accepted. Policy guidelines state:229

> NZCYPS has a statutory obligation to give effect to FGC plans, as long as they are practical and consistent with the principles of the Act. It also must work within legal, policy and financial constraints.

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225 Above n 42, 21.

226 Above n 147, 72; In 1992, 40 FGC plans made and decisions/recommendations were not accepted, the number rose to 58 in 1993.

227 Above n 147, 72.

228 Above n 227.

229 Above n 42, 64.

Given the family ideology of the 1989 Act's principles and policy guidelines, non-acceptance of plans because they are inconsistent with the principles of the Act under section 30 will be rare. It is likely a significant number of the plans not accepted are disapproved due to budgetary constraint.

The writer's proposed amendment defines the family group conference in terms of the wider group. The words "deliberations" and "family group conference" are removed from subsection (2) of section 22. Subsection (3) specifically designates the FGC as the "wider" group. This also has implications for the responsibility of funding FGC plans mentioned later in this paper.

While family should be given time to discuss in private and formulate possible decisions, the final decision should rest with the wider group. The section 30 anomaly would be addressed by removing "referring agencies" from the section's wording.

The inclusion of Care and Protection Resource Panels in section 22(1) will entitle them to representation at any FGC of their choice for the purpose of placing any information or advice deemed appropriate before the conference. Resource Panel involvement is presently contingent upon co-ordinator invitation or otherwise only with the agreement of the conference. The Mason Report stated:230

> We have heard of several examples where attendance of a Panel member at a FGC would have been highly desirable but for various reasons the Panel views were not disclosed to the conference.

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230 Above n 11, 56.

The functions of Care and Protection Resource Panels are listed in section 429 of the 1989 Act. The Mason Team recognised that Panels have an important role to play not only because of the "(usually) multi-talented nature of the Panels but also because they bring an independent voice to the process". It is noted that the Government rejected the idea of Resource Panels being included within section 22(1).231 The cost of Resource Panels undertaking a more active role may well have contributed significantly to this response.

The writer sees the role of Resource Panels, from consultation with social workers at the initial receiving of a report through to monitoring of individual cases as an overseer's position. Direct representation at FGCs will not always be necessary. Panels will however have the right, particularly important in serious cases, to be involved in a conference.

E *Section 70*

1 Recommended legislative amendment

70. (2)(d) For the purposes of this section a family group conference is deemed to be held when the conference has been correctly convened pursuant to section 21 of this Act and any two or more of those entitled to attend pursuant to section 22(1) have done so.

72 (2) Nothing in subsection (1) of this section applies in respect of any application to which section 20(2)(c) or (d) of this Act applies.

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231 Above n 57.

2. *Comment*

The 1989 Act provides little guidance as to when a FGC has taken place. The central role of the FGC is consolidated by section 70 which stipulates that holding a conference is a prerequisite to the making of an application for a declaration that a child or young person is in need of care or protection.232

If the FGC is defined by the narrow family group, and if a FGC does not take place until family deliberations have occurred, the protection of children will be contingent on family agreeing to participate in the conference process.233

> The family, whanau or family group by refusing to co-operate with the processes established by the Act for the care and protection of children and young persons would cause a child or young person to be left unprotected. The Act would be ineffective.

The problem anticipated in the above statement arose in the decision of *Application by A*.234 A family group conference was convened but the family refused to participate. Judge Mahony held that:235

> ...family members cannot be compelled to attend a conference, and in my view it cannot be said a Family Group Conference has been held if no family members were present.

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232 Section 70(2) provides three alternative grounds where an application for a declaration can be made notwithstanding that no FGC has been held. They are where the child has been placed in the custody of the Director - General under emergency powers; where the applicant believes it is in the interests of the child that an interim restraining and/or a custody order under s.78 of the 1989 Act be granted as a "matter of urgency" and an application for any such order is made at the same time as the application; and an application made on the grounds that the child has been abandoned, and after reasonable enquiries it is not possible to ascertain the where abouts of any member of the family group.

233 Above n 224, 85.

234 [1990] NZFLR 97.

235 Above n 234, 99.

As no conference had been held, and on the facts none of the exceptions contained in subsection (2) of section 70 arose, the court had no jurisdiction to act. The writer's proposed amendment to section 22, adding subsection (3) defining the FGC will help alleviate this dilemma. Tapp suggests to achieve the purpose of the 1989 Act of protecting children while at the same time respecting family autonomy is the interpretation "that a FGC is 'held' when the conference has been correctly convened any two or more of those entitled to attend pursuant to s.22(1) have done so..."236

The writers recommended addition of a subsection (d) to section 70 will prevent the situation in *Application by A* recurring. While clause 9 of the Amendment Bill to the 1989 Act makes technical amendments to the exceptions listed in subsection (2) of section, it fails to remedy the above mentioned problem.

F *Review and Monitoring*

1 *Review of "at risk" cases*

Concern was expressed to the Mason Team that no evaluation mechanism exists to monitor what happens to children whose cases do not proceed to a FGC.237

> At present the only so-called monitoring process takes place following a review of a FGC by the Family Court. There is no formal and little informal monitoring of the many 'at risk' cases by DSW. All too often such cases are 'informally resolved' without reference to a FGC.

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236 Above n 233.

237 Above n 11, 30.

There is no statutory requirement to plan, review, or monitor such cases, or indeed even cases which are referred on to a conference. The absence of these requirements in the 1989 Act is perhaps understandable, but one would expect good practice within DSW to require planning and monitoring arrangements.

In the United Kingdom, the Arrangements for Placement of Children (General) Regulations and the Review of Children's Cases Regulations 1991, require agencies to draw up and record an individual plan for the child and to review and amend as necessary on a regular basis. While these regulations deal with the "placement" of children in accommodation, "good practice" requires the same for a child provided with service other than accommodation.238

It is submitted that DSW guidelines or regulations under the 1989 Act should require the drawing up of an individual plan for each child and subsequent reviews and monitoring. Planning arrangements will safeguard the child's welfare. Department of Health guidelines in the United Kingdom recognise that:239

> The drawing up of an individual plan for each child will prevent 'drift' and focus work by: assessing the child's needs, determining the objectives that have to be met, appraising the options, making decisions in full consultation with those involved, identifying tasks that individuals are to undertake; and setting a time scale in which tasks must be achieved or reassessed.

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238 I Mallinson *The Children Act: A Social Care Guide* (Whiting and Birch Ltd, London, 1992) 186.

239 Above n 238, 187.

The drawing up of a plan is more pertinent to a case where a child is assessed to be "in need of care or protection". However, plans should be established, in consultation with parents/families, where the child is assessed to be "at risk" but not "in need of care or protection". Such cases should be reviewed and reassessed formally at least once. Fortnightly meetings between social workers and Resource Panels would provide a suitable forum for the timely review of all cases. DSW should set out in writing their arrangements governing the manner in which cases will be reviewed. These arrangements should be drawn to the attention of the child, parents, family/whanau where appropriate, care givers, and any other relevant person in each case.

2. *Review and monitoring of the FGC plan.*

Section 36 of the 1989 Act provides for a FGC to be convened at the Care and Protection Co-ordinator's own motion or at the request of at least two members of that conference. Section 36 does not stipulate that a review must be carried out, nor does it make provision for monitoring of cases. Section 424 does however place a duty upon co-ordinators to review regularly any decision, recommendation or plan made or formulated by a FGC. The Director-General is also required to establish procedures to review the situation of children and young persons who have been subject to action under the Act, in order to assess the adequacy and appropriateness of that action.240

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240 Section 7(2)(e).

The structure of review within DSW seems to be centred around section 28(c) of the 1989 Act which states that a function of the FGC is, from time to time, to review the decisions, recommendations and plans made and to review progress on the implementation of the plan. The Mason Team recognised concern with this approach:241

> Concern has been expressed about the lack of checks regarding decisions made at the FGC. Some social workers and co-ordinators seem to have adopted the approach that once a decision has been made at a FGC then "...we have no right to interfere in the private business of a family".

From the child safety and protection perspective review and monitoring are important to ascertain the consequences of a decision for the child and to check on whether undertakings made at the FGC are actually carried out. DSW Co-ordinator Practice and Policy Guidelines address some of the Mason Review's concerns. Every FGC must address the question of review; every plan must be reviewed at least once, and the FGC must specify how, when and where the review will be carried out.242 The decision of the FGC about reviewing the plan must be recorded on the SW (838)243 as part of a plan.244 In every case where the conference agrees that the child or young person is in need of protection, the FGC must address the question of monitoring the child or young person, and the decision of the conference must be recorded in the plan.245

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241 Above n 217.

242 Above n 42, 52.

243 This is the official record of the decisions, recommendations and plans of the FGC.

244 Above n 42, 47.

245 Above n 244.

The review procedure, however, seems to be totally subsumed within the FGC framework. This has advantages, for example, it facilitates continued contact and the flow of information between family/whanau and DSW. It is submitted provision should be made for independent review. The role of Resource Panels should be expanded under section 429 to include the independent monitoring and review of the plan.

Fortnightly or weekly meetings between Resource Panels and co-ordinators would provide a suitable forum for review. Each case should be reviewed within four weeks of the FGC. A second review shall be carried out not more than three months after the first, subsequent reviews shall be carried out if and when deemed necessary. All FGCs should be made aware that such a review procedure operates.

It shall be the Resource Panel's responsibility to initiate meetings of relevant personnel of DSW and other relevant persons to consider the review. The co-ordinator will be responsible for making necessary preparations and providing relevant information to participants in any meeting with Resource Panels convened to review any case. Content of the review should be recorded in writing.

VII STATE SUPPORT 246

> In addition to reinforcing traditional power structures and role assignments, insulation from outside monitoring and support can be fairly characterized as isolation. There is a fine line between autonomy, which implies independence from outside meddling and destructive interference, and isolation, which implies a lack of social supports and a lack of accountability to community norms for behaviour.

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246 Above n 1, 589.

A *Funding*

1 Recommended legislative amendment

34 **Director-General to give effect to decisions, recommendations, and plans of family group conference** - (1) The Director-General shall consider every decision, recommendation, or plan that is made or formulated by a family group conference pursuant to this Part of this Act, and, unless it is clearly impracticable or clearly inconsistent with the principles set out in sections 5, 6, and 13 of this Act, shall give effect to that decision, recommendation, or plan by the provision of such services and resources, and the taking of such action and steps, as are necessary and appropriate to the circumstances of the particular case.

(2) The Director-General **shall**, from time to time, make such grants or provide such financial assistance as may be necessary to ensure the care or protection of any child or young person pursuant to any decision, recommendation, or plan made or formulated by a family group conference pursuant to this Part of this Act.

2. *Comment*

The Mason Team recommended that the Minister of Social Welfare give a clear, unequivocal commitment to resource and fund implementation and devleopment of the 1989 Act. No such commitment was forthcoming in the Government's response to the Mason Report.247 The government considered that the "very broad" objects of the Act require individual family and community commitment. The absence of Government commitment is a grave concern. The success of the Act is largely contingent upon funding and resources.

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247 Above n 54, 35.

Part of the rhetoric of empowering families was to utilise the resources of the wider family. Use of the statute books to protect and advance the rights of children through enforcing parental/family responsibility is not peculiar to the 1989 Act. The Child Support Act 1991 purports to advance the rights of children and custodial parents by enforcing parental responsibility to support their children. These rights and responsibilities are outlined in the objects of the Child Support Act.248 Behind the rhetoric of parental responsibility lies a significant shift, from the state to parents, as to who should take primary responsibility for the financial support of custodial parents and children. Reform by the Child Support Act was thus "...motivated by fiscal exigencies rather than the needs of [custodial parents] or children".249

Section 34 of the 1989 Act is elusive in its commitment to provide finance for the implementation of FGC plans. Section 34(1) provides a legal obligation upon the Director-General to provide services and resources necessary to implement a conference plan whereas section 34(2) is expressed in discretionary language, the Director-General "may, from time to time, make such grants or provide such financial assistance as may be necessary to give effect to any plan". "Resources" in subsection (1) must, by necessary implication, be read narrowly to exclude direct funding.

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248 Section 4.

249 W Atkin "Financial Support: The Bureaucratization of Personal Responsibility" *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 210, 213.

The inclusion of the bracketed words in subsection (1) of section 34, which this writer recommends should be removed, impliedly give weight to the contention that the Act defines the FGC in the narrow sense (i.e. constituted by the family group). The anomaly created by the need to obtain agreement of the referring agency in section 30 is perpetuated in section 34(1).

What constitutes the FGC has implications for the funding of conference plans. Section 29 requires the FGC to "make such decisions, recommendations and formulate such plans as it considers necessary or desirable". If the FGC is constituted by the narrow family group it is arguable that it is the family/whanau who is charged with the legal responsibility of implementing and funding the conference plan.

The writer accepts that part of the purpose of "whanau decision making" should be to mobilize the resources of the wider family group. There is however an inherent danger in an over reliance on families to fund parts of the Act. This danger is compounded by the Commissioner for Children's finding that "reliance on community resources has not been matched by the provision of necessary programmes and services".250

Provision of a definition of FGC in section 22(3) of the writer's proposed amendment and the removal of the bracketed words in section 34(1) emphasises that funding is a joint legal responsibility between family and government.

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250 Above n 73, 12.

Social workers before accepting a conference decision, recommendation, or plan are under instructions as to how much they may commit in terms of funding. The acceptance of plans is subject to "financial constraints".251 Acceptance or refusal of a plan which is considered "expensive" will usually be contingent upon whether the plan addresses the care and protection of the child. The writer supports the care and protection of the child as the suitable yardstick in this situation (provided social workers are well versed on what constitutes "care and protection"). The addition of subsection (3) to section 34 codifies this practice. It places legal responsibility upon DSW to ensure that funding is sufficient to ensure, at the least, a child or young person's care and protection.

DSW places the onus on family/whanau to meet the costs of family/whanau members attending conferences. Meeting the costs of family/whanau members attending conferences is only permitted as a last resort. Circular memorandum 1990/263 states financial assistance can only be made available when:

(a) it is essential that the family member be present; and

(b) the attendance of that family member can only be ensured by providing some or all of the costs of attending.

While the writer accepts this policy, it must be exercised with caution.

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251 Above n 229.

The Commissioner for Children's concern about the inadequate resourcing of FGC plans suggest DSW, and in particular the Government, are placing too much of the burden upon the family/whanau and already stretched community resources. Failure to fund th 1989 Act adequately is irresponsible and does not serve well the Act's purpose to protect children.

The introduction of mandatory reporting must be contingent upon a sufficient commitment to funding. Evidence suggests DSW is not coping well with the current level of reports. The high threshold given to "in need of care or protection" and the use of informal meetings are but two examples of "shortcuts" designed to meet budgets. In the 1992 fiscal year the number of FGCs held exceeded the number budgeted for, yet the Mason Report clearly showed that not enough cases are getting to the conference stage.

Mandatory reporting will require not only greater levels of funding in the "front-line" dealing with an increase in reports but also with ancillary matters. Requiring people to report and making them liable for criminal sanction places a corresponding obligation on government to educate and provide support services to designated reporters.

Government reluctance to enlarge the role of Care and Protection Resource Panels could be directly related to its perceived cost. Again, the writer's preference for more Resource Panel involvement in the process would require additional funding.

B *Social Worker Training*

Perhaps the most disturbing aspect of the Mason Report was the consistent reference to the relatively poor level of competency and training of social workers. The Mason Team were critical of DSW management for allowing social worker competency to fall to appalling levels.252

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252 Above n 11, 114

> The overwhelming evidence pointed clearly towards a dangerous level of incompetence amongst many social workers. We believe that this state of affairs has arisen because social work training has been allowed to run down and in our opinion, that state of affairs is directly attributable to poor policy, management, administrative and financial decisions having been made at Head Office and regional level.

The Mason Team even initiated an independent assessment of the Department's competency guide and social worker training to ensure its own view could be substantiated. Both concluded:253

> That the level of expertise required of the Department's professional social workers is the lowest amongst countries with welfare systems similar to New Zealand.

Both the Mason Team and its independent Review254 were critical of the Competence Certification Programme being developed by DSW as a new training structure. The Competencies Programme is a guideline by which the Department measures knowledge and skill levels of social work staff and then develops education and training programmes to ensure minimum levels of attainment. The Mason Team reported that the system for training adopted in the Department's Competence Programme is "untested" and would not produce the high quality expertise that is required.256 The Mason Report recommended that the Minister of Social Welfare acknowledge that at best the Competency Certification Programme is useful to enhance in-service training but it should not be used to duplicate or in substitution for "professional" courses.

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253 Above n 11, 120.

254 The independent review was conducted by Professor Leon C Fulcher, Dr Jennie Harre Hindmarsh, and Dr Rajen Prasad.

255 The NZCYPS is now registered by the New Zealand Qualifications Authority as a Government Training Establishment.

256 Above n 11, 120.

A subsequent report to the Minister, included in the Government's Response to the Mason Report, recognises that the Competency Programme is akin to an in-service training programme and is distinct from attainment of professional qualifications. However, the report down-played the Mason Team's adverse comments in regard to the Competency Programme, stating that their comments could be traced to the questions that were asked and the limited material provided for comment.257

Detailed recommendations proposed by the Mason Report have gone largely unheeded. The Report favoured social workers gaining professional social work qualifications through tertiary institutions rather than the Department duplicating this function and offering "professional" courses. The Competency Programme would be limited to enhance in-service training.258

While some social work staff are currently studying full-time on study awards,259 contrary to the Mason Teams recommendations, the Competency Programme has been developed to provide a first-level certificate in social work practice, as a first step to a Level B social work qualification. Having received accreditation by the New Zealand Qualifications Authority as a Government Training Establishment, the Department has the ability to recognise the skill and experience of the large number of its staff who are not professionally qualified.

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257 Above n 54; Appendix II, 7.

258 Above n 11, 121 - 125.

259 Sixty-nine social work staff were studying full-time on study awards as of the 30 June 1993.

Dr Rajen Prasad highlights the potential dangers inherent in DSW becoming an education and training provider.260 The Department may "unwittingly... reduce the level of professional knowledge and expertise required to professionally address the legal and social responsibilities its social workers have".261

The Competency Programme has been in action for the past eight months. Stage one involved the training of "Practice Consultants" (senior social work practitioners), who in turn will train Care and Protection Co-ordinators, then social workers down to basic grade.

While the programme has a top priority, progress is impeded by the need to remove social workers from service for a six week period. The Mason Team's strategy was costed at $8 million. Its cost may well have prevented its introduction. Whether the Competency Programme is sufficient to raise social worker standards, and indeed, whether it is the best means of achieving such standards, will continue to be debated. Once again, government reliance on cheap, short term measures may further undermine public confidence in the 1989 Act.

Confidence in social workers and social work practice is imperative. The introduction of mandatory reporting, for example, will be counter productive if reporters do not have confidence in social work standards. Ironically mandatory reporting would necessitate an influx of a greater number of unqualified social workers. The control enjoyed by social workers under the 1989 Act and their relatively low standard of training and qualifications do not auger well for the protection of children.

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260 Above n 11, 115.

261 Above n 260.

VIII CONCLUSION

It has not been the purpose of this paper to question the role of the family group in deciding the future wellbeing of children. In this respect the Act is innovative and unique. What is questioned is the centrality accorded the family group, along with social workers and other officials who perform executive functions under the Act. The care and protection provisions of the Act deal with families that are not functioning well, yet the Act assumes that these very families will place the interests of their children before their own.

"Some people are reluctant to accept that the family, which is romanticised as the basis of nurturing, safety and love, can also be a place of abuse, injury and even death".262 This denial is reinforced by the philosophies which underpin the Act. It is the family group, not the child, who is accorded primacy. The interests of children are subsumed within those of the family. The non-interventionist stance taken in many of the Act's provisions pulls back the state's responsibility towards all members of the family. Respect for the family privacy is arguably being used to justify declining provision by the state of support services and resources. This poses the critical danger that family's are more likely to become isolated and thus the cycle of abuse will continue, unabated, to manifest itself.

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262 See "Child abuse: to tell or not to tell" *The Sunday Times*, Wellington, New Zealand, 3 October 1993, 9.

The provisions of the Act attempt to cater for a diverse range of interests. In so doing the interests of children have been compromised. What is required is a realignment within the Act between the interests of children and those of their families. This paper has sought to suggest ways in which that balance can be achieved. The Children, Young Persons and Their Families Amendment Bill represents a modest shift towards the interests of children. Its success, particularly that of mandatory reporting if introduced, will be contingent upon appropriate resources and support services being made available.

There is an irony in a statute which purports to protect children and simultaneously adhere to a non-interventionist philosophy governing relations between the family and the state.

IX BIBLIOGRAPHY

A Texts

W R Atkin "Financial Support: The Bureaucratization of Personal Responsibility" *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992)210.

D Daro *Confronting Child Abuse: Research for Effective Program Design* (Free Press, New York, 1988).

J Eckelaar, R Dingwall, T Murray *The Protection of Children - State Intervention and Family Life* (Basil Blackwell Publisher Ltd, London, 1983).

M D A Freeman *The Rights and Wrongs of Children* (Francis Pinter, London, 1983).

J Goldstein, A Freud, A Solnit *Beyond The Best Interests of The Child* (revised ed, Free Press, New York, 1979).

M Henaghan and P Tapp "Legally Defining the Family" *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992)1.

I Mallinson *The Children Act: A Social Care Guide* (Whiting and Birch Ltd, London, 1992).

D L Mathieson *Cross on Evidence* (4 ed, Butterworths, Wellington, 1989).

L Max *Children: Endangered Species*? (Penguin Books, Auckland, 1990).

R A McGechan *Principles of the Law of Evidence* (7 ed, Butterworths, Wellington, 1984).

J Metge and D Durie-Hall "Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law" *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 54.

Ministry of Education *Prevent Child Abuse - Guidelines for Early Childhood Education Services* (Wellington).

P Tapp, D Geddis, N Taylor "Protecting the Family" *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 168.

P R H Webb et al *Family Law in New Zealand* (5 ed, Butterworths, Wellington, 1992)

B *Articles*

W R Atkin "New Zealand: Children Versus Families - Is There Any Conflict?" (1989) 27 Journal of Family Law 231.

W R Atkin "The courts and child protection - aspects of the Children, Young Persons, and Their Families Act 1989" (1990) 20 VUWLR 319.

A Bainham "The Children Act 1989: The State and the Family" [1990] Fam Law 231.

A Bainham "The Children Act 1989: Welfare and Non-Interventionism" [1990] Fam Law 143.

J Eekelaar " Investigation Under The Children Act 1989" [1990] Fam Law 486.

D Geddis "A critical analysis of the Family Group Conference" (1993) FLB 141.

M Henaghan "The 'Rights' of Children When Decisions Are Made About [them] and Which Affect the Welfare and Interests of Children" *New Zealand Law Society Family Law Conference Papers (1991)*, 48.

L Max "An Act of Faith: Parent's Rights and Children's Welfare" *New Zealand Law Society Family Law Conference Papers (1991)*, 66.

J G McMullen "Privacy, Family Autonomy, and the Maltreated Child" (1992) 75 Marquette Law Review 569.

I Mitchell "Children's Needs in Practice" *New Zealand Law Society Family Law Conference Papers (1991)*, 75.

R P Mosteller "Child Abuse reporting laws and attorney - client confidences" (1992) 42 Duke Law Journal 203.

NZCYPS "Critical analysis of FGCs: a response" (1993) FLJ 7.

R J Paterson "Aids, HIV Testing and Medical Confidentiality" (1991) 7 Otago Law Review 388.

P T Rishworth "Applying to New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZ Recent Law Review 337.

P T Rishworth "The potential of the New Zealand Bill of Rights" [1990] NZLT 68.

M Stewart "Children, Young Persons and Their Families Act" *Law Talk*, Newsletter of the New Zealand Law Society, 3 May 1993.

P Tapp [1989] NZ Recent Law Review 143.

P Tapp "Family Group Conferences and the Children, Young Persons and Their Families Act 1989: an ineffective statute?" [1990] NZ Recent Law Review 82.

P Tapp [1992] NZ Recent Law Review 143.

M Wald "Family Preservation: Are We Moving Too Fast?" (1988) Public Welfare, Summer, 34.

J Walker "From Rights to Responsibilities for Parents: The Emancipation of Child" [1990] Fam Law 380.

C *Reports*

Department of Social Welfare, *Puao-Te-Ata-tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Government Printer, Wellington, 1986).

Report of the Working Party on the Children and Young Persons Bill, Review of the Children and Young Persons Bill (Department of Social Welfare, Wellington, 1987).

A Briefing Paper: An Appraisal of the First Year of Operation of the Children, Young Persons and Their Families Act 1989 (Office of the Commissioner for Children, Wellington, 1991).

G Maxwell, *The First Six Months: Some Statistics on the Children, Young Persons and Their Families Act* (Office of the Commissioner for Children, Wellington, 1991).

K Paterson and M Harvey *Organisation and Operation of Care and Protection Family Group Conferences* (Department of Social Welfare, Wellington, 1991).

Review of the Children, Young Persons and Their Families Act 1989 - Report of the Ministerial Review Team to the Minister of Social Welfare (1992).

The Government's Response to the Report of the Ministerial Review Team (1992).

Department of Social Welfare *Annual Report* (Fiscal, 1992).

Department of Social Welfare *Annual Report* (Fiscal, 1993).

Department of Social Welfare *Statistical Information Report* (Fiscal, 1993).

G McGirr *A Literature Review of Long-Term Outcomes of Care and Protection Action* (Department of Social Welfare, Research Unit, Wellington, 1993).

D *Other Documents*

New Zealand Children and Young Persons Service, *Operations Information 1992/10, Care and Protection Co-ordinator Practice and Policy Guidelines.*

Department of Social Welfare *Care and Protection Handbook.*

Department of Social Welfare *Circular Memorandum 1990/263 FGCs: Meeting costs of family members.*

Department of Social Welfare *Circular Memorandum 1991/155 Financial assistance under the CYP&F Act.*

Department of Social Welfare *Circular Memorandum 1991/172 Family/Whanau Agreements.*

Department of Social Welfare *Circular Memorandum 1992/44 The Place of family meeting in Care and Protection process.*

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Robinson, Shane Ian
Children, Young Persons, and Their Families Act 1989